No. 77-1177

In the

Supreme Court of the United States

OCTOBER TERM, 1977

AUBREY SCOTT,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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CASES

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To: *The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States*

Petitioner, Aubrey Scott, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered on October 5, 1977, affirming the decision of the Appellate Court of Illinois, First District.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois affirming the decision of the Appellate Court of Illinois is reported at 68 Ill. 2d 269. It is reproduced in the Appendix to this Petition at A. 1a.

The opinion of the Appellate Court of Illinois, First District entered on February 26, 1976, affirming petitioner's conviction, is reported at 36 Ill. App. 3d 304, 343 N.E. 2d 517. It is reproduced in the Appendix to this Petition at A. 6a.

The record of petitioner's bench trial in the Circuit Court of Cook County, Illinois, First District, dated January 31, 1972, is reproduced in the Appendix to this Petition at A. 22a.

JURISDICTION

The decision of the Supreme Court of Illinois was entered on October 5, 1977. The Petition for Rehearing was denied on November 23, 1977. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1) Whether the sixth and fourteenth amendments to the United States Constitution guarantee the right to counsel when a defendant is charged with an offense punishable under state law by imprisonment, regardless of whether the defendant is in fact imprisoned?

2) Whether the trial of Petitioner Scott without the assistance of counsel was so unfair as to deny due process of law?

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Constitution of the United States, Amendment XIV, Section 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Aubrey Scott was arrested on January 19, 1972, for shoplifting a sample case and an address book worth $13.68 at a F.W. Woolworth store in Chicago. Scott was charged with petty theft under Ill. Rev. Stat. ch. 38 § 16-1(A)(1) (1972), which carries a possible sentence of a fine not to exceed $500 or imprisonment not to exceed one year, or both.

On January 31, 1972, Scott, without benefit of counsel, made his first scheduled court appearance. A misunderstanding by Scott of the court's question as to his readiness for trial resulted in Scott's immediate bench trial on that day. (A. 7a-8a, 22a) Scott was not served a copy of the complaint at his arraignment, nor was he advised of what items he was accused of taking. He was also not advised of the relevance of his indigency to his right to appointed counsel, so that there is no indication of his indigent status at trial* At no time during the entire

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* However, given Petitioner's affidavit of indigency in the Appellate Court and the State's agreement as to his indigency, both courts below considered petitioner's indigency to be established. (A. 1a-2a, 10a-11a).

proceeding was Scott ever advised that he had a right to counsel and, if indigent, a right to appointed counsel. (A. 1a).

During the trial, the State's only witness was a store security guard, who testified that he saw Scott leave the store without paying for the articles. (A. 23a-24a). Scott then testified in his own behalf that he had been accused of shoplifting while still inside the store, and that he had been merely searching for the sales clerk. (A. 24a). Scott called no witnesses; the court never advised Scott that he had a right to do so.

Dissatisfied with the presentation of the facts after the defendant had finished his testimony, the court asked the prosecutor to ask more questions. (A. 25a) The prosecutor, however, refused on the grounds that the State had made its case. The court then proceeded to interrogate the defendant on its own. (A. 25a) Scott was then found guilty, and although the prosecutor recommended probation, he was fined $50. (A. 26a). On February 29, 1972, Scott filed timely notice of appeal.

The Appellate Court of Illinois found that the reach of the sixth amendment right to counsel is limited to defendants who are in fact imprisoned, and therefore Scott had no constitutional right to an appointed trial counsel. (A. 13a-14a) The Appellate Court also rejected Scott's statutory argument that he had a right to appointed counsel under Ill. Rev. Stat. ch. 38 § 113-3(b), which requires the court to appoint the Public Defender for indigents desiring counsel "in all cases, except where the penalty is a fine only. . . ." The Supreme Court affirmed on both grounds.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION LEFT OPEN IN ARGERSINGER V. HAMLIN, 407 U.S. 25 (1972), WHETHER THE SIXTH AMENDMENT RIGHT TO COUNSEL APPLIES TO DEFENDANTS FINED BUT NOT IMPRISONED FOR CRIMES PUNISHABLE BY IMPRISONMENT, HAS CAUSED EXTENSIVE DIVISION AND CONFUSION AMONG FEDERAL AND STATE COURTS.

The Fifth Circuit Court of Appeals has spoken most clearly and frequently on the scope of the sixth amendment right to counsel. It has concluded that the right must apply in all cases in which imprisonment is a possible sentence. *Potts* v. *Estelle*, 529 F.2d 450 (5th Cir. 1976) cert. denied 96 S.Ct. 646 (1977); *Thomas* v. *Savage*, 513 F.2d 536 (5th Cir. 1975). The Second Circuit has not ruled directly on the issue raised in the instant case, but has supported in principle the right to counsel in cases where the defendant faces the prospect of imprisonment. *In re Di Bella*, 518 F.2d 955, 959 (2d Cir. 1975) (right to appointed counsel in contempt proceedings where defendant is "faced with the prospect of imprisonment").

The Eighth Circuit directly conflicts with the Fifth Circuit by limiting the scope of the sixth amendment right to counsel to cases where the defendant is in fact imprisoned. *United States* v. *White*, 529 F.2d 1390 (8th Cir. 1976) (90 day suspended sentence vacated because waiver of counsel not clearly shown, but $50 fine affirmed). Opinions of the Fourth, Ninth and Tenth Circuits also reveal conflicts in principle with the Fifth and Second Circuits' position on the scope of the right to counsel. *Morgan* v. *Juvenile and Domestic Relations Court*, 491 F.2d 456 (4th Cir. 1974) (habeas corpus relief denied to defendant who had already served prison sentence due to uncounseled conviction); *but see, Richmond Black Po-*

lice Officers Assoc. v. *City of Richmond, Va.*, 548 F.2d 123, 128-129 (4th Cir. 1977) (court stated that "where a criminal contempt proceeding carries as a possible penalty the risk of imprisonment then the person so charged is guaranteed the right to counsel. . . ." Although it was held that the district court erred in refusing to grant counsel "at the outset of the proceedings when he potentially faced a risk of imprisonment," the error was deemed harmless because defendant was fined and not imprisoned); *Henkel* v. *Bradshaw*, 483 F.2d 1386 (9th Cir. 1973) (declaratory judgment that defendant has right to counsel in threatened contempt proceeding vacated as premature and undue intrusion on state court's authority); *Sweeton* v. *Sneddon*, 463 F.2d 713, 716 (10th Cir. 1972) (injunction against trial court trying defendant for a misdemeanor without counsel vacated in part because not strictly required by *Argersinger*). The First Circuit has taken an equivocal stand on the scope of the right to counsel under *Argersinger*. *United States* v. *Sawaya*, 486 F.2d 890, 892, n.2 (1st Cir. 1973) ("Despite the very narrow language chosen by the Court, *Argersinger* could also be read as extending the right to assistance of counsel at trial whenever the loss of liberty is a possibility.").

Although there are few federal district court opinions directly on point, the ones that are most relevant to the instant issue support a potential imprisonment, rather than an imprisonment-in-fact, standard. *Tate* v. *Kassulke*, 409 F. Supp. 651, 658 (W.D. Ky. 1976) ("since *Argersinger* every person charged with a misdemeanor which may result in possible imprisonment is entitled to the services of an attorney.") *Tyson* v. *New York City Housing Authority*, 369 F.Supp. 513, 521 (S.D.N.Y. 1974) (*Argersinger* requires appointment of counsel in criminal

actions where there is a possibility of imprisonment); *Geehring* v. *Municipal Court of Girard*, 357 F.Supp. 79, 82 (N.D. Ohio 1973) ("justice and fairness demand the appointment of counsel to any person found to be indigent if a possibility exists that said person might lose his liberty as a result of his being prosecuted."); *Gilliard* v. *Carson*, 348 F.Supp. 757 (M.D. Fla. 1972) (prosecutors enjoined from prosecuting indigent defendants for any offense punishable by imprisonment unless defendants are represented by counsel or make a valid waiver of counsel); *Hernandez* v. *Craven*, 350 F.Supp. 929, 936-37 (C.D. Cal. 1972) (the sixth amendment right to assistance of counsel extends to petty offenses where imprisonment is possible).

Courts in Wisconsin, Kentucky, Massachusetts, Michigan, New York, Oregon, Texas, and Washington have supported the view that the threat of imprisonment constitutionally requires the appointment of counsel. *State ex rel. Winnie* v. *Harris*, 75 Wis. 2d 547, 556, 249 N.W.2d 791, 796 (1977) ("(W)henever a defendant is charged with a crime, the penalty for which includes the requirement or option of incarceration, he must be advised of his right to counsel and further advised that if he is indigent counsel will be furnished to him at public expense unless he knowingly and intelligently waives such right to counsel."); *Jenkins* v. *Commonwealth*, 491 S.W.2d 636, 637 (Ky. App. 1973) ("It is well established that the state must furnish counsel for indigent defendants in cases which may result in imprisonment."); *Commonwealth* v. *Barrett*, 322 N.E.2d 89, 91 (Mass. App. 1976) (prior assault and battery convictions obtained without counsel and punished only by fines could not be introduced to impeach defendant); *Artibee* v. *Cheboygan Circuit Judges*, 243 N.W.2d 248, 249, 397 Mich. 54, 57 (1976) (due process

requires appointment of counsel for indigent defendants in paternity prosecutions because "the interests of the individuals affected are substantial, and the nature of the proceedings is sufficiently complex so as to require counsel to insure a fair trial."); *People* v. *Harris,* 45 Mich. App. 217, 219, 206 N.W.2d 478, 480 (1973) ("defendant has the right to appointment of counsel at trial, even though he is charged only with a misdemeanor offense, conviction of which could subject him to imprisonment."); *In re Smiley,* 36 N.Y.2d 433, 437, 330 N.E.2d 53, 55, 369 N.Y.S.2d 87, 90 (1975) ("The underlying principle (of *Gideon* v. *Wainwright*) is that when the State or Government proceeds against the individual with risk of loss of liberty or grievous forfeiture, the right to counsel and due process of law carries with it the provision of counsel if the individual charged is unable to provide it for himself."); *People* v. *Weinstock,* 363 N.Y.S.2d 878, 879, 80 Misc. 2d 510, 511 (1974) ("hereinafter the local criminal courts are on notice that defendants charged with traffic violations and subject to possible imprisonment, must be advised of their right to counsel and to have counsel assigned where the defendant is financially unable to obtain same. (See *Argersinger* v. *Hamlin* (cite)."); *Brown* v. *Multnomah County District Court,* 29 Ore. App. 917, 566 P.2d 522, 525 (1977) ("An accused has a right to counsel under the Sixth Amendment . . . in all criminal prosecutions where loss of liberty is a potential sanction. *Argersinger* . . ."); *Trevino* v. *State,* 555 S.W.2d 750, 751 (Tex. Crim. App. 1977) ("It is well settled that criminal defendants in misdemeanor cases are entitled to counsel if there exists a possibility that imprisonment may be imposed. See *Argersinger* . . .") *Tetro* v. *Tetro,* 86 Wash. 2d 252, 254, 544 P.2d 17, 19 (1975) ("It was this threat (of imprisonment) that the court in *Argersinger* v. *Hamlin* (cite) held was determinative of the right to counsel in criminal cases.")

Courts of five states besides Illinois have refused to appoint counsel for defendants who are not actually imprisoned: *Rollins* v. *State,* 299 So.2d 586, 588 (Fla. 1974) *cert. denied* 419 U.S. 1009; *Mahler* v. *Birnbaum,* 95 Idaho 14, 15, 501 P.2d 282, 283 (1972); *Nelson* v. *Tullos,* 323 So.2d 539, 545-6 (Miss. 1975); *State* v. *Henderson,* 549 S.W.2d 566, 568 (Mo. App. 1977); *State* v. *Ross,* 36 Ohio App. 2d 185, 304 N.E.2d 396, 407 (1973), *appeal dismissed* 415 U.S. 904 (1974), *but see In re Fisher,* 39 Ohio St. 2d 71, 82, 313 N.E.2d 851, 858 (1974), in which the court held that all persons threatened with a loss of liberty in civil commitment proceedings have a fourteenth amendment right to counsel.

Thus, the Court's determination of whether or not the sixth amendment right to counsel extends to defendants who are fined but not imprisoned for crimes punishable by imprisonment is critical not only because federal and state courts are thoroughly divided on the question, but also because these courts base their disparate conclusions on the same authority, *Argersinger* v. *Hamlin.* The confusion will, of course, persist until the Court chooses to address this question left unresolved in *Argersinger.*

II. THE ILLINOIS SUPREME COURT'S APPLICATION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL ONLY TO IMPRISONED DEFENDANTS CANNOT BE RECONCILED WITH THE RATIONALE OF BOTH ARGERSINGER AND THIS COURT'S SUBSEQUENT RIGHT TO COUNSEL DECISIONS.

Mr. Justice Powell, concurring in *Argersinger,* observed that neither logic nor sixth amendment precedent would

support a limitation of the right to counsel to imprisoned defendants.* 407 U.S. at 51-52. The conflict between such a limitation and the principles underlying the sixth amendment has become even sharper in light of the Court's more recent sixth amendment interpretations. In two such cases the Court explained that the sixth amendment requires counsel in criminal trials as opposed to proceedings which are less formal, *Gagnon* v. *Scarpelli,* 411 U.S. 778, 789 (1973), or non-adversary, *Middendorf* v. *Henry,* 425 U.S. 25, 40-41 (1976), because the invariable attributes of the criminal trial process make a fair trial impossible without the assistance of counsel. Indeed, in *Farretta* v. *California,* 422 U.S. 806 (1975), in which the Majority agreed with the thesis "that the help of a lawyer is essential to assure the defendant a fair trial," 422 U.S. at 832-833, three Justices of the Court believed counsel to be so indispensible that a defendant has no constitutional right to be tried without counsel. The Chief Justice emphasized the absolute necessity of counsel for a fair trial in observing "that in all but an extraordinary small number of cases an accused will lose whatever defense he may have if he undertakes to conduct the trial himself." 422 U.S. at 838 (dissenting).

If counsel is thus essential for a fair trial, the imprisonment-in-fact limitation of the right to counsel can be justified only if an uncounseled, and therefore unfair, criminal trial is a *de minimis* due process violation whenever no imprisonment results. However, as Mr. Justice

* The Majority in *Argersinger* did not dispute Mr. Justice Powell's judgment as to the illogic and lack of constitutional support for an imprisonment-in-fact limitation on the right to counsel, but responded instead, that the Court was not considering the application of the sixth amendment where loss of liberty is not involved. 407 U.S. at 37.

Powell has pointed out in regard to the coverage of the sixth amendment, there is no basis in the Constitution for distinguishing between deprivations of liberty and property and there is no basis in reality for assuming that "non-jail" petty offense convictions will result in less serious consequences than brief jail sentences. 407 U.S. at 51-52. *See also Mayer* v. *City of Chicago,* 404 U.S. 189, 197 (1971).

The Illinois Supreme Court below did not justify its limitation of the right to counsel to imprisoned defendants on the ground either that a defendant can have a fair criminal trial without the assistance of counsel, or that Aubrey Scott in fact received a fair trial. Neither did the court maintain that the consequences of a non-jail misdemeanor conviction are generally *de minimis* or that the consequences of Aubrey Scott's petty theft conviction were in fact *de minimis.* The court, however, did explain its limitation of the right to counsel to imprisonment-in-fact cases by noting that the Court in *Argersinger* had extended the right only to cases of actual imprisonment and that it was "not inclined to extend *Argersinger* . . ." (A. 3a) Since the principle of *Argersinger,* as well as of this Court's other right to counsel decisions, in the words of Mr. Justice Powell, "foreshadows the adoption of a broad prophylactic rule applicable to all petty offenders," *Argersinger,* 407 U.S. at 52 (concurring), the court below erred in erecting *Argersinger* as a conclusive barrier to any further extension of the right to counsel. As illustrated by the one-sided trial below, the unfair burdens faced by an uncounseled criminal defendant require that the historical evolution of the concept of right to counsel not end with the imprisoned defendant in *Argersinger,* but encompass as well those defendants charged with crimes serious enough to carry the threat of imprisonment.

III. ARGERSINGER'S REQUIREMENT OF A PRE-TRIAL DETERMINATION OF A DEFENDANT'S PROBABLE SENTENCE RESULTS IN ARBITRARY, UNCONSTITUTIONAL JUDICIAL DECISION MAKING, THE FRUSTRATION OF LEGISLATIVE INTENT AND CONFUSION IN THE ADMINISTRATION OF CRIMINAL JUSTICE.

The trial judge's determination of whether or not he is likely to impose a prison sentence upon conviction and therefore whether he must appoint counsel is of critical importance to the defendant because, on the one hand, a decision not to appoint counsel will, as it did in the instant case, increase the likelihood of conviction, while, on the other hand, a decision to appoint counsel will increase the likelihood of a prison sentence after conviction since the judge has already made up his mind that imprisonment is the most likely penalty. *See State ex rel. Winnie* v. *Harris,* 75 Wis.2d 547, 556, 249 N.W.2d 791, 795 (1977) *infra.* 13. In non-jury cases this crucial pre-trial determination of sentence must be arbitrary because it is inevitably based upon an inadequate factual record. Since the trier of fact before trial cannot properly receive information about the defendant beyond the allegations of the complaint or indictment, his determination of the probable sentence will constitute little more than uninformed guesswork. Due process requires that the determination of a defendant's critical right to counsel be based upon more reliable, accurate grounds than a judge's guess as to the type of evidence that will be adduced at trial.

The State has no interest in preserving the pre-trial sentencing determination required by *Argersinger* since it abrogates the intent of state legislatures that the full range of sentencing alternatives, including imprisonment, be available after the facts of a crime have been brought

to light and after the facts in aggravation and mitigation have been heard. On this ground the Supreme Courts of Washington and Wisconsin have denied the right of a judge to engage in predictive sentencing determinations:

> We reject the idea that a court can determine in advance of trial what the punishment will be. Such a procedure would violate every concept of due process . . . . The power to decide what acts shall be criminal, to define crimes, and to provide what the penalty shall be is legislative. . . . It would be wholly wrong for a court or a judge to determine in advance to abrogate a part of a statute or ordinance—either in a specific case or in a whole class of cases.

McInturf v. *Horton,* 85 Wash. 2d 704, 706, 538 P.2d 499, 500 (1975). *See also State ex rel. Winnie* v. *Harris,* 75 Wis. 2d 547, 556, 249 N.W.2d 791, 795-6 (1977), where the court noted:

> "Under this individualized prediction standard, the mere fact that the right to counsel has been gone into strongly indicates that the judge is already considering the possibility of jail for a particular defendant even though he has not heard the evidence. On the other hand, this system would also result in people not being incarcerated who should be because of an erroneous evaluation of sentence limitations prior to hearing the evidence in the case."

Finally, the discretion *Argersinger* gives judges to deny counsel and the questionable effect of such denials on the validity of the underlying convictions has created confusion and division among courts in determining the permissible use of uncounseled convictions in subsequent criminal proceedings. Cases disallowing the use of such convictions in subsequent prosecutions which may result in imprisonment are: *Twyman* v. *State of Oklahoma,* 560 F.2d 422, 423 (10th Cir. 1977); *Wilcox* v. *State,* 269 So.2d

420, 421 (Fla. App. 1972); *Griffin* v. *State,* 142 Ga. App. 362, 235 S.E.2d 724 (1977); *State* v. *Kirby,* 289 N.E.2d 406, 407 (Ohio Com. Pl. 1972); *Walker* v. *State,* 486 S.W. 2d 330, 331 (Tex. Crim. App. 1972). Cases in which prior uncounseled convictions were allowed to be introduced in subsequent proceedings leading to imprisonment are: *United States* v. *Allen,* 556 F.2d 720 (4th Cir. 1977) *State* v. *McGrew,* 127 N.J. Super. 327, 317 A.2d 390 (1974); *Aldrighetti* v. *State,* 507 S.W. 2d 770 (Tex. Crim. App. 1974); *Wood* v. *Superintendent,* 355 F. Supp. 338, 343 n. 5 (E.D. Va. 1973); *State* v. *Giddings,* 216 Kan. 14, 531 P.2d 445 (1975); *People* v. *Heal,* 20 Ill. App. 3d 965, 313 N.E.2d 670, 672 (1974).

In sum, a determination by the Court that all defendants charged with crimes punishable by imprisonment have a right to counsel would avoid the due process problems inherent in having the right to counsel depend upon judicial guess-work as to the most likely sentence. It would avoid contravening the intent of every state legislature that the full range of sentencing alternatives, including imprisonment, be considered in light of the facts adduced at trial and sentencing hearing. Finally, it would avoid the present uncertainty as to the use of prior uncounseled convictions in subsequent proceedings.

CONCLUSION

For the foregoing reasons the petitioner respectfully submits that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

In The Supreme Court of the State of Illinois.

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee, v. AUBREY SCOTT, Appellant.

Mr. Justice Moran delivered the opinion of the court:

Following a bench trial in the circuit court of Cook County, defendant, Aubrey Scott, was convicted of theft and fined $50. The appellate court affirmed (36 Ill. App. 3d 304), and we granted defendant leave to appeal.

On January 19, 1972, defendant was apprehended for shoplifting merchandise valued under $150, and was charged with theft pursuant to section 16-1 of the Criminal Code of 1961, which provided:

> "A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both." Ill. Rev. Stat. 1971, ch. 38, par. 16-1.

Defendant was released on bail pending his first appearance. On the scheduled date, he appeared in court without counsel. The record indicates that the court informed the defendant of the charge and asked him if he was ready for trial. Defendant responded that he was ready for trial, the court directed the clerk to again read the charges, and defendant pleaded not guilty. A jury trial was waived, and a bench trial followed resulting in defendant's conviction and fine. At no time during the proceeding was defendant advised of a right to have assistance of counsel, or, if indigent, the right to have counsel appointed.

The record indicates that defendant was an indigent at the time of his initial appeal, but there is no indica-

tion of his indigency at trial. We will, however, assume for the purpose of this appeal that defendant was indigent at the time of his trial.

Defendant initially contends that all persons charged with a criminal offense which, upon conviction, carries the potential for imprisonment are constitutionally entitled, if indigent, to have counsel appointed, even if the conviction results in only the levying of a fine. Defendant, however, readily concedes that the United States Supreme Court has not to date extended the right to counsel this far.

In *Argersinger* v. *Hamlin* (1972), 407 U.S. 25, 32 L. Ed. 2d 530, 92 S. Ct. 2006, the Supreme Court extended the right to counsel to all criminal prosecutions which resulted in actual imprisonment. The *Argersinger* court stated:

> "We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.
>
> * * *
>
> Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts." 407 U.S. 25, 37, 40, 32 L. Ed. 2d 530, 538, 540, 92 S. Ct. 2006, 2012, 2014. Accord, *People* v. *Morrissey* (1972), 52 Ill. 2d 418; *People* v. *Coleman* (1972), 52 Ill. 2d 470.

Recently, this court ruled that a defendant is not entitled to the appointment of counsel under either the Federal or Illinois constitutions where he or she is charged with an ordinance violation which provides for a fine only upon conviction. (*City of Danville* v. *Clark* (1976),

63 Ill. 2d 408, 412-13, *cert denied* (1976), 429 U.S. 899, 50 L. Ed. 2d 184, 97 S. Ct. 266.) We are unpersuaded by defendant's argument that the mere possibility of incarceration upon conviction should trigger a defendant's constitutional right to counsel, for there exists no possibility of incarceration if counsel was not properly waived. We are not inclined to extend *Argersinger* and *Morrissey* merely because a defendant is charged with a statutory offense which provides for various sentencing alternatives upon conviction. See *Nelson* v. *Tullos* (Miss. 1975), 323 So. 2d 539; *Mahler* v. *Birnbaum* (1972), 95 Idaho 14, 501 P.2d 282.

Defendant next contends that he was statutorily entitled to the appointment of counsel pursuant to either section 109—1(b)(2) or section 113—3(b) of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1971, ch. 38, pars. 109—1(b)(2), 113—3(b)). Section 109—1(b)(2), set forth in the article entitled "Preliminary Examination," provides that when a person is arrested without a warrant, he shall be brought before a court and

> "(b) The judge shall:
>
> * * *
>
> (2) Advise the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney at law of this State to represent him in accordance with the provisions of Section 113—3 of this Code." (Ill. Rev. Stat. 1971, ch. 38, par. 109—1(b)(2).)

The State argues that the record in this case indicates no preliminary hearing was held, and, unless a preliminary hearing was conducted, section 109 is inapplicable. The State's contention need not be reached for, even if section 109 were applicable, it would not assist the defendant here. As provided above, the statutory right to appointed counsel pursuant to section 109—1(b)(2) is dependent on the provisions of section 113-3 of the Code.

Section 113—3(b) provides, *inter alia*:

> "In all cases, except where the penalty is a fine only, if the court determines that the defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel. ***" (Ill. Rev. Stat. 1971, ch. 38, par. 113—3(b).)

Defendant argues that the term "penalty" used in the above section refers to the penalties set forth in the statute under which the criminal defendant is charged. Under his interpretation, indigent defendants are entitled to appointed counsel in all cases except where the prescribed statutory penalty is a fine only. We disagree. "Penalty" as used in this section refers to the punishment imposed against the defendant by the court upon conviction. Where the court imposes a penalty of a fine only, a defendant is not statutorily entitled to appointed counsel. Consequently, defendant was not entitled to counsel pursuant to either section 109-1(b)(2) or 113-3(b).

Defendant finally asserts that, even if he is not entitled to the appointment of counsel, section 109-1(b)(2) required the court to advise him of the right to secure counsel and to have counsel present to assist him.

Again, assuming section 109 to be applicable to this case, we do not believe it supports the defendant's contention. Although we recognize that all defendants are entitled to have counsel assist them in criminal proceedings, section 109-1(b)(2) does not require the court to advise them of this right in all cases. Since the defendant was penalized only by fine, he was neither constitutionally nor statutorily entitled to have counsel present. The court was, therefore, under no obligation to obtain a waiver before proceeding to trial without counsel and, hence, was under no obligation to advise the defendant of his right to counsel.

Accordingly, the judgment of the appellate court is affirmed.

Judgment affirmed.

Mr. Justice Goldenhersh, dissenting:

I dissent. It is clear under the holding of the Supreme Court in *Argersinger* v. *Hamlin*, 407 U.S. 25, 32 L.Ed. 2d 530, 92 S. Ct. 2006, and our decisions in *People* v. *Morrissey*, 52 Ill. 2d 418, and *People* v. *Coleman*, 52 Ill. 2d 470, that a defendant has a right to counsel in any criminal prosecution which might result in actual imprisonment, and I agree with Judge Leighton's statement, in dissent, that the right "is so important that judges should not engage in nice calculations about when that right should be enjoyed" (36 Ill. App. 3d 304, 314). The majority quotes (slip opinion page 2) that portion of *Argersinger* which endows trial courts with a degree of prescience which I doubt exists, that is, that a judge, prior to hearing any evidence, "will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts" (407 U.S. 25, 40, 32 L. Ed. 2d 530, 540, 92 S. Ct. 2006, 2014). I have searched *Argersinger* in vain for the source of this knowledge prior to the time when a judge has heard evidence in the case.

The clear and explicit language of section 109-1(b)(2) of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1971, ch. 38, par. 109-1(b)(2)) requires that the judge shall advise a defendant of his right to counsel in accordance with the provisions of section 113-3 of the Code (Ill. Rev. Stat. 1971, ch. 38, par. 113-3). Section 113-3 provides, without drawing the distinction made by the majority, that every person charged with an offense shall be allowed counsel before pleading to the charge.

I must, of course, concede that because of the fortuitous circumstance that this defendant was not sentenced to a period of incarceration, *Argersinger* does not *per se* require reversal of the judgment. However, as has been pointed out in numerous decisions, in matters involving the constitutional rights of its citizens, Illinois is free to set higher standards than those imposed by the decisions of the Supreme Court. The General Assembly has

seen fit so to do. The adverse effect of failure to be provided with counsel is not limited to the possibility of incarceration. It may well be that had this defendant known of his right to counsel, and elected to have counsel, he might have been acquitted of the charge. The failure to advise him of his right to counsel requires that the judgment be reversed.

In The

APPELLATE COURT OF ILLINOIS

First District

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

AUBREY SCOTT,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
Honorable Maurice W. Lee, *Presiding.*

Mr. Justice Hayes delivered the opinion of the court.

This is an appeal by defendant-appellant, Aubrey Scott (hereinafter defendant), from his conviction of petty theft for shoplifting, for which he was fined $50.00. He paid the fine and timely filed his notice of appeal. He had been arrested without a warrant at the scene of the incident. A few hours later, he had posted $100 in cash (10% of the pretrial bond of $1,000 prescribed by Supreme Court Rule), and had been freed from custody with a first court appearance scheduled for eleven days later. On the scheduled date he duly appeared in court, but he was without counsel. The court proceeding began as a preliminary hearing on the existence of probable cause to charge him with the offense. But, when he indicated to the court that he was then ready for trial,

the court ordered him arraigned, and he pleaded not guilty. After having been advised of his right to a jury trial, he waived a jury. His bench trial followed immediately and resulted in his conviction and sentence. At no time during the entire proceeding was he ever advised of any right to be represented by counsel. This is the issue which he presents as reversible error on this appeal.

In detail, the facts are as follows: On the evening of 19 January 1972, defendant, then 52 years old, was arrested by a Chicago Police Officer for "shoplifting" at the F.W. Woolworth Company's store at 211 South State Street, Chicago, Illinois, pursuant to the charge of a store security guard. Early the following morning, defendant posted the prescribed bond of $1,000 by depositing $100 in cash, and was released from custody with a first court appearance scheduled for 31 January 1972. The complaint, filed by the security guard on 21 January 1972 in the Municipal Department, First Municipal District of the Circuit Court of Cook County, Illinois, charged defendant with the theft, at the time and place mentioned above, of a sample case and an address book of the value of $150.00 or less (specifically, of the value of $13.68), which was the property of the Woolworth Company, with the intent thereby to deprive the said Company permanently of the use and benefit of the said property—all in violation of Ill. Rev. Stat. 1969, ch. 38, par. 16-1(a)(1).

On 31 January 1972, defendant appeared in open court as scheduled but without counsel. The court advised defendant that he was charged with the offense of theft. The court then inquired as to whether defendant was going to be ready for trial. Up to this point, the proceeding was clearly a preliminary hearing on the existence of probable cause to charge defendant with petty theft and, if so, to grant leave to complainant to file the complaint.

Defendant, however, understood the court to be asking whether he (defendant) was presently ready for trial,

and defendant said that he was. When the State answered ready, the court ordered defendant to be arraigned. The clerk first again informed defendant that he was charged with the offense of theft, and then inquired whether defendant was ready for trial, to which defendant answered he was. Called upon to plead to the charge, defendant pleaded not guilty and then orally waived a jury trial. His bench trial immediately proceeded. At no time during the entire proceeding was defendant ever advised that he had a right to counsel and, if indigent, a right to appointed counsel except where, in the latter event, the penalty upon conviction is a fine only.

The sole witness for the State was William Bray, the security guard at the Woolworth store. He testified that on 19 January 1972, he was on duty at the store; he saw defendant approach a sales girl and heard defendant ask the girl to unlock an attache case; the girl did so; defendant then walked around the store for about 15 or 20 minutes, carrying the case and holding a ten dollar bill in his hand; while defendant was walking around, he picked up an address book and put it in his pocket; defendant passed by sales girls as he walked around the store. The guard testified further that he (the guard) then walked out of the store onto State Street; a few minutes later, defendant walked out of the store onto State Street, still carrying the attache case; the time was about 6:00 P.M.; the witness identified himself and ordered defendant back into the store; defendant said the case belonged to him and there were a number of articles in the case which defendant said belonged to him and which defendant had put into the case before leaving the store. The witness identified People's Exhibit 1 as the case involved, and said that the case was the property of F.W. Woolworth Company and that it was priced for retail sale at $12.95. The State thereupon rested its case-in-chief.

Defendant testified in his own behalf as follows: He had placed articles of his own into the case to see whether they would fit, which they did. He walked around the

store carrying the case with his articles in it and looking for the sales girl who had given the case to him. The sales girl did not work behind the counter from which she had handed him the case, but rather stood near the counter. He is partially blind and he could not see the sales girl. Suddenly, Bray came into the store through the State Street door, grabbed him by the wrist, and said: "You are a shoplifter." Defendant replied that he was not; he had come to buy a case and was looking for the sales girl who had handed him the case for inspection. He showed Bray that he had money with which to buy it. After a second security guard had come up behind him and grabbed his hand, the police came and took him to jail.

The State declined any cross-examination, presented no rebuttal testimony, and rested its case. The court indicated that there were things it wished to know, so the prosecutor suggested that the court question defendant. The court first asked where defendant had been stopped, and noted that defendant had testified that he had been stopped in the store and had never gone out onto State Street. The court then asked how much money defendant had with him when he had been stopped, and whether defendant had offered any money to anyone. Defendant replied that he had almost $300.00 in his pocket and that he had the ten dollar bill in his hand to pay the sales girl that amount or whatever larger amount she might indicate.

At that point, the court said: "I don't believe you, sir. Finding of guilty. What do you [the prosecutor] have in aggravation?" The prosecutor stated that, in 1957, defendant had been convicted of petty larceny and had been sentenced to thirty days in the House of Correction and that this was defendant's most recent prior conviction. Defendant then noted that this conviction had occurred thirteen years before. (In fact, it must have occurred either 14 or 15 years before.) The prosecutor recommended probation, but the court fined defendant $50

without any costs. The fine was promptly paid out of the bond deposit. On 29 February 1972, defendant filed timely notice of this appeal.

The order entered by the trial court on 31 January 1972 in substance recited:

1) Now comes William Bray, presents his Complaint under oath, and moves the court that he be granted leave to file it instanter; the court, having examined the Complaint and having examined William Bray under oath, and being satisfied that there is probable cause for filing the Complaint, hereby grants leave to file it instanter.
2) Since defendant, arrested without a warrant or other process, is present in open court, the court takes jurisdiction of his person and orders the Sheriff to take defendant into custody.
3) Defendant was duly arraigned and pleaded not guilty to the offense charged.
4) Defendant waives trial by jury.
5) Trial before the Court without a jury is now had and there is a finding of guilty, and a judgment of guilty is entered upon the finding, and a fine of $50 is assessed against defendant.
6) Judgment for the fine is satisfied that same day by payment of $50 deducted from defendant's cash bond.

OPINION

As a preliminary matter, we note that both defendant and the State on this appeal treat defendant as an indigent person in the trial court as well as on this appeal. Defendant was convicted and sentenced and paid his fine on 31 January 1972. He filed his notice of appeal on 29 February 1972. It was not until 27 April 1972 that defendant petitioned the trial court for the appointment of a named attorney as his appellate counsel and for a

free transcript of proceedings on the grounds of his indigency. His supporting affidavit alleged that his income for the preceding year was $1752.00, that he had no assets, and that his prospective income would consist solely of public assistance payments. The petition was allowed and the named attorney was appointed as defendant's appellate counsel. Hence, the record does not show that defendant ever did petition for an appointed trial counsel on the grounds of indigency. And yet, on this appeal, both parties agree that the issue is one of defendant's right as an indigent to appointed trial counsel and of his right to have been so advised; both parties simply assume that defendant was in fact an indigent person in the trial court. In order to decide the issues presented, we indulge the same assumption.

Defendant's first contention on appeal is that, as an indigent, he had a right to appointed trial counsel under the Sixth Amendment to the United States Constitution (applicable to the States under the Fourteenth Amendment) even though he was actually punished by a fine only, because the offense for which he was tried was also punishable by incarceration so that at trial he was faced with potential incarceration; and that this right to appointed trial counsel had not been knowingly and intelligently waived by him for the simple reason that he had not been advised by the court that he had such a right.

The penalty provision of the statute for violation of which defendant was prosecuted is in relevant part as follows:

> "Penalty.
>
> A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. A person convicted of such theft a second or subsequent time, or after a prior conviction of any type of theft, shall be im-

prisoned in the penitentiary from one to 5 years. * * *" Ill. Rev. Stat. 1969, ch. 38, par. 16-1.[1]

To support his contention, defendant relies on *Argersinger* v. *Hamlin* (June 1972), 407 U.S. 25, 32 L. Ed. 2d 520, 92 S. Ct. 2005, a case in which the defendant-misdemeanant was sentenced to 90 days in jail.[2] But in *Argersinger,* Mr. Justice Douglas speaking for the court, expressly said:

> "We need not consider the requirements of the Sixth Amendment as regards the right to [trial] counsel where loss of liberty is not involved, however, for here petitioner was in fact sentenced to jail." 407 U.S. at 37.

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[1] At the hearing in aggravation and mitigation, the prosecutor informed the court that in 1957 defendant had been convicted of petty theft and sentenced to 30 days in the House of Correction. Therefore, it might appear that defendant, if convicted in the instant case, was facing the enhanced penalty of punishment in the penitentiary. In order to invoke the enhanced penalty, there is no limit on the period of time between the two convictions. *People* v. *Ferrara* (1969), 111 Ill. App. 2d 472, 250 N.E. 2d 530, cert. den. 398 U.S. 927, 26 L. Ed. 2d 89, 90 S. Ct. 1815. But the enhanced penalty may not be imposed unless the first conviction is alleged in the indictment and proved at the trial. *People* v. *Owens* (1967), 37 Ill. 2d 131, 225 N.E.2d 15: *People* v. *Weaver* (1968), 41 Ill. 2d 434, 243 N.E. 2d 245, cert. den. 395 U.S. 959, 23 L. Ed. 2d 746, 89 S. Ct. 2100; *People* v. *Dixon* (1970), 46 Ill. 2d 502, 263 N.E. 2d 876; *People* v. *Ramey* (1974), 22 Ill. App. 3d 916, 317 N.E. 2d 143. In the instant case, the first conviction in 1957 for petty theft was not alleged in the complaint and was not proved at trial. Hence, defendant in the instant case, was not tried for an offense which was punishable by imprisonment in the penitentiary.

[2] *Argersinger* has been held entitled to retroactive application. *People* v. *Morrissey* (1972), 52 Ill. 2d 418, 288 N.E. 2d 397; *People* v. *Coleman* (1972), 52 Ill. 2d 470, 288 N.E. 2d 396.

The court's holding was then expressed as follows:

> "We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." 407 U.S. at 37.

Hence, it is clear that *Argersinger* does not support defendant's contention, and that what defendant is asking us to do is to extend *Argersinger* to his situation in which his punishment was by fine only in an amount less than the cash bail which he had posted. But we have not been cited to, nor have we found, any case in which a State reviewing court has so extended *Argersinger.* On the contrary, this court in *People* v. *Heal* (Second District, 1974), 20 Ill. App. 3d 965, 967-968, 313 N.E. 2d 670 has already declined to do so, holding that in misdemeanor prosecutions generally, where no sentence of confinement is in fact imposed, there is no requirement as a matter of constitutional law that the defendant be represented by trial counsel. In *People* v. *Bailey* (Third District, 1973), 12 Ill. App. 3d 779, 301 N.E. 2d 481, this court expressly found it "unnecessary to decide whether the rule of *Argersinger* should apply to offenses because merely punishable by imprisonment. . . ." Hence, we adhere to the decision in *Heal* and decline to extend the *Argersinger* holding to cases such as the instant case in which defendant was punished by a fine only in an amount less than the amount of the cash bond which defendant had already posted.[3] Hence, we hold that, under

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[3] We are aware that some lower federal courts hold the position for which defendant here contends. Even before *Argersinger* was decided, the Court of Appeals for the Fifth Circuit had gone beyond *Argersinger* to hold the position for which defendant contends, and has adhered to its position after *Argersinger. Harvey* v. *Mississippi* (1965), 340 F. 2d 263; *McDonald* v. *Moore* (1965), 353 F. 2d 106; *Matthews* v. *Florida* (1970), 422 F. 2d 1046; *Olvera* v. *Beto* (1970), 429 F. 2d 131; *Thomas* v. *Savage*

such circumstances, defendant had no constitutional right to an appointed trial counsel.

Defendant's second contention focuses upon a necessary consequence of the *Argersinger* decision which would be eliminated if *Argersinger's* constitutional requirement of an appointed trial counsel were extended to all cases in which the defendant faced potential incarceration. The reference is to what Chief Justice Burger's concurring opinion deemed a necessary predictive pre-trial evaluation by the trial judge (with the assistance of the prosecutor)

> "of each case to determine whether there is a significant likelihood that, if the defendant is convicted, the trial judge will sentence him to a jail term". 407 U.S. at 42.

The opinion of the court put the matter as follows:

> "Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts". 407 U.S. at 40.

Defendant contends that this necessary predictive evaluation is itself unconstitutional in State courts under the

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[3] (Continued)

(1975), 513 F. 2d 536. See, however, *Cottle* v. *Wainwright* (1973), 477 F. 2d 269, in which the Fifth Circuit did not adhere to its position in a case in which the convicted misdemeanant had been given a 20-day suspended sentence and there was nothing in the record to show that the defendant had been imprisoned for this conviction. A few Federal District Courts in other circuits have also held the position for which defendant here contends. *Geehring* v. *Municipal Court of Girard* (N.D. Ohio, 1973), 357 F. Supp. 79; *Hernandez* v. *Craven* (C.D. Cal. 1972), 350 F. Supp. 929, 936-937.

due process and equal protection guarantees of the Fourteenth Amendment because, for want of an objective standard by which to make the predictive evaluation, the evaluation will be arbitrary on the part of each individual trial judge with the result that one defendant will be fined only, while another defendant under identical circumstances will be imprisoned. It suffices to say that, even if the same two hypothetical indigent defendants were each given appointed trial counsel as a constitutional right, the same disparity of sentencing could occur after both had been convicted. The same evaluation must be made whether it be done before trial or after trial and conviction. The only difference we can see is that some factors relevant to the evaluation could not be made available for the pretrial predictive evaluation of the trial judge without prejudice to the defendant (e.g., the defendant's prior criminal record). We find no merit in this contention of defendant.

As a related matter, defendant also contends that the predictive evaluation requires the trial court to foreclose itself from using the full range of sentencing options which the legislature intended to have after conviction. We see no merit in this contention either because, in its predictive evaluation, the trial court is actually exercising the full range of its legislatively-afforded sentencing options by discarding some of those options in its search for the most appropriate sentencing alternative.

Defendant's third contention is that he had an Illinois statutory right to appointed counsel which was afforded to him by two specific Illinois statutes, which statutory right was not knowingly and intelligently waived by him for want of any advisement by the court to defendant that defendant had such a statutory right to appointed counsel. The two relevant statutes are Ill. Rev. Stat. 1969, ch. 38, par. 109-1(b)(2) and par. 113-3. In relevant part, par. 109-1(b)(2) is as follows:

"(Preliminary Examination):

(b) The judge shall:

(2) Advise the defendant of his right to counsel and if [defendant is] indigent shall appoint a public defender or licensed attorney at law of this State to represent him in accord with the provisions of Section 113-3 of the Code."

Again, in relevant part, par. 113-3 is as follows:

"(Arraignment):

(a) Every person charged with an offense shall be allowed counsel before pleading to the charge. If the defendant desires counsel and has been unable to obtain same before arraignment, the court shall recess court or continue the cause for a reasonable time to permit defendant to obtain counsel and consult with him before pleading to the charge. If the defendant desires counsel and has been unable to obtain same before arraignment, the court shall recess court or continue the cause for a reasonable time to permit defendant to obtain counsel and consult with him before pleading to the charge.

(b) In all cases, except where the penalty is a fine only, if the court determines that the defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel. * * *"

If we decide that either of the above statutory provisions creates a statutory right to appointed counsel in defendant, then the issue of whether he waived that right knowingly and intelligently will become relevant. On that issue of waiver of a right of counsel, Supreme Court Rule 401(a)(3) (which became effective on 1 September 1970) becomes applicable. Ill. Rev. Stat. 1971, ch. 110A, par. 401(a)(3). The said Supreme Court rule reads as follows:

"(a) Waiver of Counsel. Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of a crime punishable by imprisonment in the penitentiary without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

* * *

(3) That he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court."[4]

Defendant advances three specific subcontentions:

(a) In violation of the provisions of paragraph 109-1(b)(2), the judge, as a preliminary hearing judge, neither advised defendant of his right to counsel nor appointed counsel for him as an indigent, in accord with the provisions of par. 113-3:

(b) In violation of par. 113-3(b), the judge, as the arraignment judge, did not appoint the Public Defender to represent him as an indigent before he was required to plead to the charge;

(c) He had not knowingly and intelligently waived his right to counsel because he had not been advised of that right as required by par. 109-1 (b)(2) and by Supreme Court rule 401 (a)(3).

As a preliminary matter in reviewing these three subcontentions, we note that the State has taken the position that the transcript of proceedings on 31 January 1972 does not reflect the fact that there had been any preliminary hearing on that date; if so, of course, par. 109-1 (b)(2) would not be applicable. But the transcript can reasonably be construed as showing that the proceeding

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[4] The phrase "in the penitentiary" was deleted by an amendment effective 1 September 1974. The Committee Comments relating to this amendment state that the amendment was intended to conform the rule to the 1972 *Argersinger* decision.

on that date began as a preliminary hearing on the issue of probable cause to prosecute for the purpose of permitting the complainant to file his complaint instanter. This construction is confirmed by the judgment order of the court entered at the close of that proceeding. The first portion of that judgment order expressly recites that William Bray presents his Complaint under oath and moves the court that he be granted leave to file it instanter; that the court, having examined the Complaint and having examined William Bray under oath, and being satisfied that there is probable cause for filing the Complaint, grants leave to file it instanter. On that state of the record, we find that there was in fact a preliminary hearing on 31 January 1972.

We deal first with defendant's contention that, as an indigent, he had a statutory right to appointed counsel. Defendant first points to Ill. Rev. Stat. 1969, ch. 38, par. 109-1(b)(2) relating to preliminary examination. But the right to appointed counsel referred to therein is a right "in accord with the provisions of Sec. 113-3 of the Code". In *People* v. *Bonner* (1967), 37 Ill. 2d 553, 229 N.E. 2d 527, cert. den. 392 U.S. 910, 20 L. Ed. 2d 1368, 88 S. Ct. 2067, our Supreme Court construed par. 109-1(b)(2) as referring to the right to counsel at arraignment created by par. 113-3, and held that par. 109-1(b)(2) did not create any statutory right to counsel at the preliminary hearing.[5] Hence, the only relevant statute dealing with

[5] In *Bonner*, the defendant was contending that par. 109-1(b)(2) created in him a right to appointed counsel at his preliminary hearing on probable cause to prosecute him for a felony. Employing a policy of strict literal construction, the Supreme Court held that the said statutory provision did not create any such right to appointed counsel at the preliminary hearing, but only at arraignment because of the clause "in accord with the provisions of Sec. 113-3 of this Code". The court also held that the defendant had no *constitutional* right to appointed counsel at his preliminary hearing because the preliminary hearing was not a critical stage in the criminal proceeding.

the creation or existence of a *statutory* right to appointed counsel in an indigent defendant is par. 113-3(b) dealing with the existence of a right to appointed counsel at or prior to arraignment (and presumably thereafter at trial), with the appointment to be made by the arraignment judge or, upon earlier application and a showing of indigency, by the preliminary hearing judge.

Turning, then, to par. 113-3(b), we see immediately that the instant defendant faces a problem in demonstrating that the paragraph is applicable to him, owing to the express exception from "all cases" of cases "where the penalty is a fine only". In an attempt to meet that problem, defendant contends that the exception should be construed to read "except where the offense is punishable by a fine only". This is the narrow critical issue as to the existence of a right to appointed counsel in the instant indigent defendant. Defendant purports to find some support for his suggested construction in *People* v. *Bailey, supra,* where the court said:

> "Although we do not decide the issue in this case, it seems to us that based on practical and legal

[5] (Continued)
This latter holding was subsequently overruled by the decision of the United States Supreme Court in *Coleman* v. *Alabama* (1970), 399 U.S. 1, 26 L. Ed. 387, 90 S. Ct. 1999. Hence, an indigent defendant being prosecuted for a felony now has a constitutional right to appointed counsel at his preliminary hearing. *People* v. *Adams* (1970), 46 Ill. 2d 200, 263 N.E. 2d 490, aff'd. sub. nom. *Adams* v. *Illinois*, 405 U.S. 278, 31 L. Ed. 2d 202, 92 S. Ct. 916. But the instant defendant was being prosecuted for a misdemeanor and, upon conviction, was then in fact sentenced to the payment of a small fine only. Since we have already declined herein to extend *Argersinger* to cover that situation even in respect of the defendant's right to trial counsel, it follows *a fortiori* that we must decline to extend *Argersinger* to create a constitutional right in the instant indigent defendant to appointed counsel at the preliminary examination.

consideration, the better policy in misdemeanor cases would be for the court to comply with Supreme Court Rule 402 [Ill. Rev. Stat. 1973, ch. 110A, par. 402], where the offense charged is punishable by imprisonment." 12 Ill. App. 3d at 782.

But we can see no persuasive analogy whatever between the above-quoted language and the proper construction of the language of the statutory exception here involved.

On the other hand, the State, in urging a strict literal construction of the language of that statutory exception, relies on *People* v. *Dupree* (1969), 42 Ill. 2d 249, 246 N.E. 2d 285. But *Dupree* does not deal with the statutory exception at all. It is, however, a case manifesting a policy of strict literal construction of par. 113-3. In order, therefore, to implement that policy of strict construction, we hold that the language of the express exception in par. 113-3(b) must be read literally and cannot be given the construction sought by defendant. Hence, we hold that defendant as an indigent had no statutory right to appointed counsel at arraignment because his penalty was a fine only so that he fell within the express exception in par. 113-3(b).

Since we have concluded that defendant as an indigent had neither a statutory nor a constitutional right to appointed counsel either at his preliminary hearing or at his arraignment or at his trial, it is unnecessary for us to consider whether or not he waived any such right.

For the foregoing reasons, we affirm the judgment of the trial court.

Judgment Affirmed.

STAMOS, P.J., concurs.

LEIGHTON, J., dissents:

I believe that the right of an accused to be told he can have counsel to assist him in his defense, and if he is indigent, that one will be appointed for him, is so important that judges should not engage in nice calculations about when that right should be enjoyed. Compare *Glasser* v. *United States* (1942), 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457, 467; *People* v. *Noble*, 42 Ill. 2d 425, 248 N.E. 2d 96.

In this case, defendant appeared in the trial court for a preliminary hearing on a theft charge. By the laws of this state, the judge was required to tell him that he had the right to counsel. (Ill. Rev. Stat. 1971, ch. 38, par. 109-1 (b)(2); Supreme Court Rule 401, Ill. Rev. Stat. 1971, ch. 110A, par. 401. It has been held that this right exists whether or not the accused is indigent. See *People* v. *Manikas*, 87 Ill. App. 2d 227, 230 N.E. 2d 577; compare *Alexander* v. *City of Anchorage* (Alaska 171) 490 P. 2d 910. Furthermore, it is the law of this state that if an accused, without being advised of his right to counsel, is subjected to a trial for which he can be incarcerated, the judgment entered in that proceeding will be set aside. *People* v. *Fletcher*, 74 Ill. App. 2d 387, 220 N.E. 2d 70 (abst.); compare *People* v. *McKenzie*, 89 Ill. App. 2d 157, 231 N.E. 2d 702.

The record before us clearly shows that although defendant was in court for a preliminary hearing and then went to trial, he was not advised of his right to counsel. Defendant was charged with theft, an offense not punishable by fine only, (Ill. Rev. Stat. 1971, ch. 38, par. 16-1) and the state concedes that he was an indigent person when he appeared in the trial court. Accordingly, he should have been advised of his right to counsel.

For these reasons, I vote to reverse this judgment and remand it for a new trial in which the defendant's right to counsel will be preserved and protected. Therefore, I respectfully dissent.

REPORT OF TRIAL PROCEEDINGS

IN THE MUNICIPAL COURT OF CHICAGO
First Municipal District

THE CIRCUIT COURT, COOK COUNTY, ILLINOIS
THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff

vs.

AUBREY SCOTT,
Defendant

No. 72MC 839456

REPORT OF PROCEEDINGS at the hearing of the above-entitled cause before the Honorable Maurice W. Lee, one of the Judges of the said Court, on the 31st day of January, 1972.

Appearances:
Hon. Edward V. Hanrahan
State's Attorney, by
Mr. Sam Grossman,
Assistant State's Attorney,
appeared on behalf of the People

The Clerk: Sheet 1, Line 24; Aubrey Scott; William Bray.
The Court: Who are you?
Mr. Scott: Scott.
The Court: You are charged with the offense of theft.
Mr. Scott: Well, your Honor, that isn't true.
The Court: I said you are charged with it.
My next inquiry is are you going to be ready for trial?
Mr. Scott: Am I ready?
The Court: Yes.
Mr. Scott: I am ready for trial.
The Court: Is the State ready?
Mr. Grossman: State is ready.
The Court: Arraign the defendant, please.
The Clerk: You are charged with the offense of theft. Are you ready for trial?

Mr. Scott: Yes, I am.
The Clerk: How do you plead to the charge?
Mr. Scott: Not guilty.
The Clerk: Do you want to be tried by this Court or before a jury?
Mr. Scott: Well, it doesn't matter. Right here will be okay with me.
(Witnesses sworn)
The Court: Has he got something that will expedite the case, Mr. Grossman?
Show it to him.
Nothing he offered so far?
Mr. Grossman: That is all evidence of something that happened.

WILLIAM BRAY, called as a witness on behalf of the People of the State of Illinois, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Grossman

Q. For the record, what is your name?
A. William Bray.
Q. Where are you employed?
A. S. W. Woolworth, 211 South State; Security Guard.
Q. Calling your attention to the 19th of January '71, at S. W. Woolworth in the City of Chicago, were you on duty?
A. Yes.
Q. Did you have occasion to see one Aubrey Scott, and I indicate the defendant on the right, for the record?
A. Yes, I did.
Q. Where did you see him?
A. Mr. Scott approached one of the sales girls and asked her to unlock some of the attache cases we have locked up. She did so, and Mr. Scott walked around the store fifteen or twenty minutes, I [illegible], with a ten dollar bill in his hand, and by the sales girls, back and forth, and kept walking around and picked up an address book and put it in his pocket.

And then, after watching Mr. Scott another five minutes, I walked out on State Street, and a few minutes later, Mr. Scott walked out with the attache case.

Q. What time of day was it?

A. I believe it was about six in the afternoon.

Q. What did you do when you saw him with the case?

A. I identified myself and ordered Mr. Scott to go back into the store.

Q. And did you ask him if he had a receipt for it?

A. Mr. Scott said it belonged to him.

Mr. Scott had put a number of articles, including the one he has here, inside of the case prior to walking out of the store.

Q. Is this the case you saw him with (indicating)?

A. Yes.

Q. Whose property is it?

A. S. W. Woolworth.

Q. What is the value of the case?

A. I believe there is a tag which would indicate the value as twelve ninety-nine.

Q. All that took place in the City of Chicago, County of Cook, State of Illinois?

A. Yes.

Mr. Grossman: State offers this as People's Exhibit 1.

(Witness excused)

The Court: People rest?

Mr. Grossman: People rest.

The Court: What do you wish to say?

Mr. Scott: I had taken my things out to put in there to see if it would fit, and then I walked around looking for the girl, which I couldn't find, and I am partially blind and I was constantly looking for her. And all of a sudden, I don't know where he come from, he grabbed me by the wrist and says, "You are a shoplifter."

I said "I know I came to buy a case," and I showed him I had money to buy what I want. And so I showed him I had money to buy. And then some other fellow who does the same type of work, he was behind and pushed me and grabbed me by the hand and tell me, "I should take you down and beat your so-and-so."

And I said, "For what? I haven't done anything. I had money to pay for whatever I am buying."

So then the police come and put my arms behind me and handcuffed me and took me to jail.

And naturally I wouldn't buy the briefcase. I had to find out whether it fit my articles. That was the point in putting my articles in it. After it fit, I said, "Good. That is what I like." And I went to look for the girl.

Mr. Grossman: We will rest on the State's case.

The Court: There's a lot of questions I want to know.

Mr. Grossman: Ask them.

The Court: Why don't you ask them? Are you going to leave it right there?

Mr. Grossman: We feel we have made our case.

The Court: Where did he get stopped?

Mr. Grossman: He testified he was coming out of the store.

The Court: He indicates he got stopped in the store. He indicates that he wanted to try it out for size; indicated he had money. Next question is how much money. What did he do with the money? Did he ever offer money to anybody? Did he ever see a sales clerk?

Mr. Scott: I had almost $300 in my pocket. I was looking for the girl because she didn't have what you would call a counter that you work behind. She stands out near the counter, and I didn't see her.

The Court: Where did you get arrested, sir?

Mr. Scott: Where was I? Inside of the store.

The Court: You weren't on State Street?

Mr. Scott: On State Street? Inside of the store.

The Court: But you weren't on the street?

Mr. Scott: No. I didn't go out on the street.

The Court: When you were arrested?

Mr. Scott: When this man come in the door—I am inside. He comes in the door and grabs me by my wrist like this (indicating), and said, "You are a shoplifter."

I said, "I am not. I am looking for the sales girl."

The Court: He said he observed you a long time walking around the store with a ten dollar bill in your hand.

Mr. Scott: I was looking for the girl.
The Court: What were you going to buy?
Mr. Scott: I was going to pay the girl.
The Court: What were you going to buy with the ten dollar bill?
Mr. Scott: More, if she said it. I had it to pay.
The Court: I don't believe you, sir. Finding of guilt. What do you have in aggravation?
The Court Sergeant: Most recently, it is 1957.
The Court: What?
The Court Sergeant: Thirty days, House of Correction, petty larceny, Judge Slater.
Mr. Scott: That's been 13 years, and I promised I would never go back to no jail, and I was not guilty of trying to make a theft.
Mr. Grossman: We recommend probation.
The Court: Fifty and no costs.

(whiich was all of the testimony given and proceedings had in the above entitled cause in Branch 41 of the Municipal Division of the Circuit Court of Cook County, on January 31, 1972.)

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1177

AUBREY SCOTT,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1978
CERTIORARI GRANTED MAY 30, 1978

INDEX TO APPENDIX

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* At Page 6a of Petition for Writ of Certiorari. The opinion is also reported at 36 Ill. App. 3d 304, 343 N.E. 2d 517 (1976).

** At Page 1a of Petition for Writ of Certiorari. The opinion is also reported at 68 Ill. 2d 269, 369 N.E. 2d 881 (1977).

APPENDIX

RELEVANT DOCKET ENTRIES

IN PEOPLE OF THE STATE OF ILLINOIS v. AUBREY SCOTT, CIRCUIT COURT OF COOK COUNTY, ILLINOIS, MUNICIPAL DEPARTMENT, FIRST DISTRICT (72 MC1 839456)

Page of Record	Date	Item
RC 3	1-20-73 (sic)	Cash deposit bail bond
RC 5	1-21-72	Complaint
RC 6-7	1-31-72	Court Clerk's narrative of proceedings
RC 9	2-29-72	Notice of Appeal
RC 20	4-27-72	Grant of petitioner's motion for leave to defend as a poor person
R 1-10	1-31-72	Report of proceedings in trial of petitioner

COMPLAINT IN THE MATTER OF PEOPLE v. SCOTT

STATE OF ILLINOIS
COUNTY OF COOK—SS

THE CIRCUIT COURT
OF COOK COUNTY

The People of the State of Illinois
Plaintiff

vs.

Aubrey Scott
Defendant

No.
72 MC1 J839456

COMPLAINT

William Brady, complainant, now appears before The Circuit Court of Cook County and in the name and by the

authority of the People of the State of Illinois states that Aubrey Scott has, on or about 19 January 1971 at F.W. Woolworth 211 S. State committed the offense of Theft in that he Knowingly (obtained) or (exerted) unauthorized control over property sample case and address book total $13.68 of the value of $150.00 or less, the property of F.W. Woolworths' with the intent to deprive F.W. Woolworths permanently of the use and benefit of said property in violation of Chapter 38 Section 16-1(A)(1) Illinois Revised Statute and against the peace and dignity of the People of the State of Illinois.

/s/ William Brady
211 S. State HA7-4473

FILED
MUNICIPAL COURT OF CHICAGO
FIRST MUNICIPAL DISTRICT OF
CIRCUIT COURT, COOK COUNTY
JAN 21 1972

William Brady, being duly sworn, on his oath, deposes and says that he has read the foregoing complaint by him subscribed and that the same is true.

/s/ William Brady

Subscribed and sworn to before me

.....

Matthew J. Danaher
Clerk of Court

I have examined the above complaint and the person presenting the same and have heard evidence thereon, and am satisfied that there is probably cause for filing the same. Leave is given to file said complaint.

.....
(Judge's signature illegible)

COURT CLERK'S NARRATIVE OF PROCEEDINGS

Be It Remembered, that afterwards, to-wit: on the 31st day of January, 1972, the following among other proceedings were had and entered of record in said court which proceedings were and are in words and figures following, to-wit:

Present Honorable Maurice W. Lee
One of the Judges of the Court
Edward V. Hanrahan, State's Attorney
Richard J. Elrod, Sheriff
Matthew J. Danaher, Clerk

THE PEOPLE OF THE STATE OF ILLINOIS v. AUBREY SCOTT	No. 72-MC-J839456 Criminal

Now comes, William Brady, and in the name of the People of the State of Illinois presents to the Court the Complaint herein under oath, and moves the Court that leave be granted to file said Complaint, and the presiding

Judge of this Court having examined said Complaint, and having examined under oath the person presenting the same, and having heard evidence thereon, and being satisfied that there is probable cause for filing the same, and said Judge, having so endorsed the same and the Court being fully advised in the premises, it is ordered that leave be and hereby is granted to file said Complaint instanter.

And it appearing to the Court that the Defendant herein was arrested without warrant, capias, or other writ, and is now here present in open Court, the Court takes jurisdiction of the person of said Defendant, and the Sheriff of this Court is ordered forthwith to take the body of said Defendant into his custody and said body safely keep so that said Sheriff may have the same before this Court to answer to the Plaintiff for and concerning the offense charged in said Complaint, and this order shall be sufficient warrant of said Sheriff for so doing.

Now come the people by the State's Attorney and the Defendant as well in his own proper person and said Defendant being duly arraigned and forthwith demanded of and concerning the charge alleged against him in the complaint herein how he will acquit himself thereof for a plea in that behalf, says that he is not guilty in manner and form as charged in said complaint.

Said Defendant being duly advised by the Court as to his right to a trial by jury in this cause, elects to waive a trial by jury, and this cause is by agreement in open Court between the parties hereto, submitted to the Court for a trial without a jury.

The people being now here represented by the State's Attorney and said Defendant being present in his own proper person and the trial of this cause is now here entered upon before the Court without a jury and the Court, after hearing all the testimony of the witnesses and the arguments of counsel, and being fully advised in the premises, renders the following finding, to-wit:

> "THE COURT FINDS THE DEFENDANT GUILTY IN MANNER AND FORM AS CHARGED IN THE COMPLAINT HEREIN. WHEREFORE IT IS ORDERED THAT THE SAME BE ENTERED OF RECORD HEREIN."

The State's Attorney now here moves the Court for final judgment on the finding of guilty herein, said people being represented here by the State's Attorney and said Defendant being present in his own proper person and not saying anything further why the judgment of the Court should not now be pronounced against him on the finding of guilty entered in this cause, the Court finds that it has jurisdiction of the subject matter of this cause and of the parties hereto, and it is considered and adjudged by the Court that said Defendant is guilty of the criminal offense of VIOLATION OF CHAPTER 38 SECTION 16 - (A) (1) (THEFT) on said finding of guilty.

Now come the people by the State's Attorney and the Defendant as well in his own proper person and it appearing that the Defendant has been convicted in this cause, a fine is assessed against said Defendant in the sum of FIFTY DOLLARS ($50.00).

Judgment for Fine satisfied by payment of FIFTY DOLLARS ($50.00) on JANUARY 31, 1972, deducted from Cash Bond D7224338.

REPORT OF TRIAL PROCEEDINGS

IN THE MUNICIPAL COURT OF CHICAGO
FIRST MUNICIPAL DISTRICT

THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff

vs.

AUBREY SCOTT,

Defendant

No. 72MC 839456

REPORT OF PROCEEDINGS at the hearing of the above-entitled cause before the Honorable MAURICE W. LEE, one of the Judges of the said Court, on the 31st day of January, 1972.

Appearances:
Hon. Edward V. Hanrahan
State's Attorney, by
Mr. Sam Grossman,
Assistant State's Attorney,
appeared on behalf of the People

The Clerk: Sheet 1, Line 24; Aubrey Scott; William Bray.
The Court: Who are you?
Mr. Scott: Scott.
The Court: You are charged with the offense of theft
Mr. Scott: Well, your Honor, that isn't true.
The Court: I said you are charged with it.
My next inquiry is are you going to be ready for trial?
Mr. Scott: Am I ready?
The Court: Yes.
Mr. Scott: I am ready for trial.
The Court: Is the State ready?
Mr. Grossman: State is ready.
The Court: Arraign the defendant, please.

The Clerk: You are charged with the offense of theft. Are you ready for trial?
Mr. Scott: Yes, I am.
The Clerk: How do you plead to the charge?
Mr. Scott: Not guilty.
The Clerk: Do you want to be tried by this Court or before a jury?
Mr. Scott: Well, it doesn't matter. Right here will be okay with me.
(Witnesses sworn)
The Court: Has he got something that will expedite the case, Mr. Grossman?
Show it to him.
Nothing he offered so far?
Mr. Grossman: That is all evidence of something that happened.

WILLIAM BRAY, called as a witness on behalf of the People of the State of Illinois, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Grossman

Q. For the record, what is your name?
A. William Bray.
Q. Where are you employed?
A. S. W. Woolworth, 211 South State; Security Guard.
Q. Calling your attention to the 19th of January '71, at S. W. Woolworth in the City of Chicago, were you on duty?
A. Yes.
Q. Did you have occasion to see one Aubrey Scott, and I indicate the defendant on the right, for the record?
A. Yes, I did.
Q. Where did you see him?
A. Mr. Scott approached one of the sales girls and asked her to unlock some of the attache cases we have locked up. She did so, and Mr. Scott walked around the store fifteen or twenty minutes, I believe, with a ten dollar bill in his hand, and by the sales girls, back and forth,

and kept walking around and picked up an address book and put it in his pocket.

And then, after watching Mr. Scott another five minutes, I walked out on State Street, and a few minutes later, Mr. Scott walked out with the attache case.

Q. What time of day was it?

A. I believe it was about six in the afternoon.

Q. What did you do when you saw him with the case?

A. I identified myself and ordered Mr. Scott to go back into the store.

Q. And did you ask him if he had a receipt for it?

A. Mr. Scott said it belonged to him.

Mr. Scott had put a number of articles, including the one he has here, inside of the case prior to walking out of the store.

Q. Is this the case you saw him with (indicating)?

A. Yes.

Q. Whose property is it?

A. S. W. Woolworth.

Q. What is the value of the case?

A. I believe there is a tag which would indicate the value as twelve ninety-nine.

Q. All that took place in the City of Chicago, County of Cook, State of Illinois?

A. Yes.

Mr. Grossman: State offers this as People's Exhibit 1.

(Witness excused)

The Court: People rest?

Mr. Grossman: People rest.

The Court: What do you wish to say?

Mr. Scott: I had taken my things out to put in there to see if it would fit, and then I walked around looking for the girl, which I couldn't find, and I am partially blind and I was constantly looking for her. And all of a sudden, I don't know where he come from, he grabbed me by the wrist and says, "You are a shoplifter."

I said "I know I came to buy a case," and I showed him I had money to buy what I want. And so I showed him I had money to buy. And then some other fellow

who does the same type of work, he was behind and pushed me and grabbed me by the hand and tell me, "I should take you down and beat your so-and-so."

And I said, "For what? I haven't done anything. I had money to pay for whatever I am buying."

So then the police come and put my arms behind me and handcuffed me and took me to jail.

And naturally I wouldn't buy the briefcase. I had to find out whether it fit my articles. That was the point in putting my articles in it. After it fit, I said, "Good. That is what I like." And I went to look for the girl.

Mr. Grossman: We will rest on the State's case.

The Court: There's a lot of questions I want to know.

Mr. Grossman: Ask them.

The Court: Why don't you ask them? Are you going to leave it right there?

Mr. Grossman: We feel we have made our case.

The Court: Where did he get stopped?

Mr. Grossman: He testified he was coming out of the store.

The Court: He indicates he got stopped in the store. He indicates that he wanted to try it out for size; indicated he had money. Next question is how much money. What did he do with the money? Did he ever offer money to anybody? Did he ever see a sales clerk?

Mr. Scott: I had almost $300 in my pocket. I was looking for the girl because she didn't have what you would call a counter that you work behind. She stands out near the counter, and I didn't see her.

The Court: Where did you get arrested, sir?

Mr. Scott: Where was I? Inside of the store.

The Court: You weren't on State Street?

Mr. Scott: On State Street? Inside of the store.

The Court: But you weren't on the street?

Mr. Scott: No. I didn't go out on the street.

The Court: When you were arrested?

Mr. Scott: When this man come in the door—I am inside. He comes in the door and grabs me by my wrist like this (indicating), and said, "You are a shoplifter."

I said, "I am not. I am looking for the sales girl."

The Court: He said he observed you a long time walking around the store with a ten dollar bill in your hand.

Mr. Scott: I was looking for the girl.

The Court: What were you going to buy?

Mr. Scott: I was going to pay the girl.

The Court: What were you going to buy with the ten dollar bill?

Mr. Scott: More, if she said it. I had it to pay.

The Court: I don't believe you, sir. Finding of guilt.

What do you have in aggravation?

The Court Sergeant: Most recently, it is 1957.

The Court: What?

The Court Sergeant: Thirty days, House of Correction, petty larceny, Judge Slater.

Mr. Scott: That's been 13 years, and I promised I would never go back to no jail, and I was not guilty of trying to make a theft.

Mr. Grossman: We recommend probation.

The Court: Fifty and no costs.

(which was all of the testimony given and proceedings had in the above entitled cause in Branch 41 of the Municipal Division of the Circuit Court of Cook County, on January 31, 1972.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1177

AUBREY SCOTT,

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE STATE OF ILLINOIS IN OPPOSITION TO THE PETITION

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
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LEE HETTINGER,
JAMES B. DAVIDSON,
Assistant State's Attorneys,
Of Counsel.

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CITATIONS

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OPINIONS BELOW

The opinion of the Supreme Court of Illinois affirming Petitioner's conviction is reported at 68 Ill. 2d 269, 369 N.E. 2d 881. The opinion of the Appellate Court of Illinois, First District, is reported at 36 Ill. App. 3d 304, 343 N.E. 2d 517.

JURISDICTION

The decision of the Supreme Court of Illinois was entered on October 5, 1977. The Petition for Rehearing was denied by that court on November 23, 1977. The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(3) as to question No. 1 only. (See Reasons for Denying the Writ at Point II., infra.)

QUESTIONS PRESENTED

1. Whether a misdemeanant whose conviction results solely in a small fine has a constitutional right to appointed counsel at state expense.

2. Whether this Court should grant a Writ of Certiorari when a petitioner claims that he has been denied a fair trial, although he failed to raise or argue that issue in either state court of review and failed to allege in this Court that a specific error was committed at trial.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crim. shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining his defense.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ill. Rev. Stat. ch. 110A, § 612(j) (1971):

> The following civil appeals rules apply to criminal appeals insofar as appropriate:
> (j) Contents of briefs: Rule 341.

Ill. Rev. Stat. ch. 110A, § 341(e)(7) (1971):

> The appellant's brief shall contain the following parts in the order named:
>
> > Argument, which shall contain the contentions of the appellant and the reasons thereof, with citation of the authorities and the pages of the record relied on . . . Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.

STATEMENT OF THE CASE

On January 31, 1972, Petitioner Aubrey Scott appeared *pro se* in the Municipal Court of Cook County. After being informed that he was charged with misdemeanor theft, Petitioner responded to a question by the court by stating, "I am ready for trial." Petitioner then plead not guilty to the charge and waived his right to a jury trial.

The sole witness for the People, William Bray, was a security guard for S. W. Woolworth in the City of Chicago. Mr. Bray testified that on January 19, 1971, he observed Petitioner ask a Woolworth salesgirl to unlock several attache cases. For the next 15 to 20 minutes, Petitioner walked around the store with the attache case and a $10.00 bill. During this time, Petitioner picked up an address book and put it in his pocket, Mr. Bray testified. Mr. Bray further stated that Petitioner then walked out of the store with the attache case. When Mr. Bray placed Petitioner under arrest outside the store, Petitioner said that the case belonged to him.

Petitioner testified on his own behalf at trial. Petitioner said that he had placed items in the case to see if it was the proper size. Petitioner had almost $300.00, he testified, and was trying to find a salesgirl at the time he was arrested. Petitioner further testified that he was arrested while still inside the store. The Assistant State's Attorney did not cross-examine Petitioner or present rebuttal testimony.

After hearing the evidence presented by Petitioner, the court stated, "I don't believe you, sir. Finding of guilty." The trial court subsequently fined Petitioner $50.00 for the misdemeanor violation.

Petitioner then appealed to the Appellate Court of Illinois, claiming that the federal constitution and the Illinois statutes provide a right to appointed counsel for misdemeanants who are fined upon conviction. The appellate court determined that constitutional and statutory law only require appointment of counsel in misdemeanor cases that result in imprisonment. Petitioner then appealed to the Illinois Supreme Court, which similarly rejected both of Petitioner's contentions. The Illinois Supreme Court subsequently denied a petition for rehearing in this case.

REASONS FOR DENYING THE WRIT

I.

ALTHOUGH PETITIONER CONTENDS THAT FEDERAL AND STATE COURTS ARE CONFUSED AND DIVIDED ON WHETHER THE FEDERAL CONSTITUTIONAL RIGHT TO APPOINTED COUNSEL EXTENDS TO MISDEMEANANTS WHO ARE FINED, BUT NOT IMPRISONED, A CAREFUL READING OF THE CASE LAW DEMONSTRATES A CLEAR UNDERSTANDING BY THE COURTS THAT THE CONSTITUTION DOES NOT REQUIRE APPOINTMENT OF COUNSEL AT STATE EXPENSE FOR MISDEMEANANTS WHO ARE NOT DEPRIVED OF THEIR LIBERTY.

As this Court stated in *Argersinger* v. *Hamlin*, 407 U.S. 25, 40, 92 S. Ct. 2006, 2014 (1972), counsel must be provided in misdemeanor cases "that end up in the actual deprivation of a person's liberty." Conforming to the *Argersinger* ruling, three circuits of the United States Court of Appelas have expressly held that the right to appointed counsel attaches only if imprisonment is in fact

imposed. *United States* v. *White,* 529 F. 2d 1390 (8th Cir. 1976); *Marston* v. *Oliver,* 485 F. 2d 705 (4th Cir. 1973); *Henkel* v. *Bradshaw,* 483 F. 2d 1386 (9th Cir. 1973). In addition, three other circuit courts have recognized that a misdemeanant who is merely fined is not constitutionally entitled to appointed counsel. *In re Di Bella,* 518 F. 2d 955, 957, 957, 959 (2d Cir. 1975); *United States* v. *Sawaya,* 486 F. 2d 890, 892 (1st Cir. 1973); *Sweeten* v. *Sneddon,* 463 F. 2d 713, 715-716 (10th Cir. 1972). Only the United States Court of Appeals for the Fifth Circuit has based the right to appointed counsel upon the statutory sentencing alternatives in misdemeanor cases. *Thomas* v. *Savage,* 513 F. 2d 536 (5th Cir. 1975). In announcing its rule, however, the court demonstrated its clear understanding that this extension was not constitutionally mandated, stating:

> In this respect the cases of this circuit go beyond the Supreme Courts decision in *Argersinger* v. *Hamlin* . . . which would only require the appointment of counsel when a sentence of imprisonment is imposed. *Id.* at 537.

Thus, every federal circuit court that has commented upon this issue has recognized that the Constitution does not require appointment of counsel in misdemeanor cases in the absence of a deprivation of liberty.

Similarly, no extensive division or confusion on this issue exists in the federal district courts. Several district courts have refused to extend the right to appointed counsel to misdemeanants who suffer no loss of liberty. *Barr* v. *United States,* 415 F. Supp. 990 (W.D. Okla. 1976); *Scott* v. *Hill,* 407 F. Supp. 301 (E.D. Va. 1976); *Linkous* v. *Jordan,* 401 F. Supp. 1175 (W.D. Va. 1975). In dictum, five district courts have stated that imprisonment triggers the constitutional right to appointed counsel for misdemeanants. *Karr* v. *Blay,* 413 F. Supp. 579, 586 (N.D. Ohio 1976); *Vail* v. *Quinlan,* 406 F. Supp. 951, 960 (S.D.N.Y. 1976); *La Bar* v. *Goodman,* 397 F. Supp. 463, 464 (W.D.N.C. 1975); *Abbit* v. *Bernier,* 387 F. Supp. 57, 62-63 A. 12 (D. Conn. 1974); *Lessard* v. *Schmidt,* 349 F. Supp. 1078, 1098 (E.D. Wis. 1972), *vacated another grounds and remanded,* 421 U.S. 957, 95 S. Ct. 1943 (1975), *judgment reinstated,* 413 F. Supp. 1318 (1976). Only one federal district court has exceeded the scope of *Argersinger.* In *Gilliard* v. *Carson,* 348 F. Supp. 757, 761-762 (MD. Fla. 1972), a suit for injunctive relief seeking appointment of counsel in misdemeanor cases, the court noted that the defendant municipality persistently violated the *Argersinger* mandate. The court stated:

> This Court holds that these clear rights are being violated with the result that many citizens are being unlawfully deprived of their personal liberty. The Court concludes further that there is imminent danger that members of the class of indigent citizens facing prosecution in the Municipal Court will similarly have their clearly established constitutional rights violated and suffer irreparable harm by being unlawfully deprived of their personal liberty. *Id.*

The court in *Gilliard* did not purport to expand the right to counsel, only to guarantee the right as this Court announced it in *Argersinger.* In light of an imminent danger of deprivation of liberty to a large number of defendants, the court required appointment of counsel in all cases in the municipality as an extraordinary remedy for the repeated flagrant violation of *Argersinger.* Moreover, the court demonstrated no confusion as to the law since it recognized that the denial of counsel merely precludes the imposition of a jail sentence. *Id.* at 761.

No state court has said that the federal constitution requires appointment of counsel for misdemeanants who are fined. Indeed, thirteen states besides Illinois have expressly held that appointment of counsel is not required for misdemeanants who are not sentenced to jail. *State* v. *Sanchez,* 110 Ariz. 214, 516 P. 2d 1226 (1973); *Rollins* v. *State,* 299 So. 2d 586 (Fla. 1974); *Johnston* v. *State,* 236 Ga. 370, 223 S.E. 2d 808 (1976); *Mahler* v. *Birnbaum,* 95 Idaho 14, 501 P. 2d 282 (1972); *Commonwealth* v. *Boudreau,* 285 N.E. 2d 915 (Mass. 1972); *Nelson* v. *Tullos,* 323 So. 2d 539 (Miss. 1975); *People* v. *Farinaro,* 36 N.Y. 2d 283, 326 N.E. 2d 819, 367 N.Y.S. 2d 258 (1975); *Whorley* v. *Commonwealth,* 215 Va. 740, 214 S.E. 2d 447 (1975); *State* v. *Francis,* 85 Wash. 2d 894, 540 P. 2d 421 (1975); *State* v. *Camp,* 326 So. 2d 644 (La. App. 1976); *State* v. *McGrew,* 127 N.J. Super. 327, 317 A. 2d 390 (1974); *State* v. *Ross,* 304 N.E. 2d 396 (Ohio App. 1973); *Aldrighetti* v. *State,* 507 S.W. 2d 770 (Tex. App. 1974). In addition, eight other state courts have interpreted the federal constitutional right to appointed counsel consistent with *Argersinger's* loss of liberty limitation. *Alexander* v. *State,* 258 Ark. 633, 527 S.W. 2d 927 (1975); *Lindh* v. *O'Hara,* 325 A. 2d 84 (Del. 1974); *State* v. *Giddings,* 216 Kan. 14, 531 P. 2d 445 (1975); *People* v. *Studaker,* 387 Mich. 698, 199 N.W. 2d 177 (1972); *State ex rel. Kansas City* v. *Meyers,* 513 S.W. 2d 414 (Mo. 1974); *Kovarik* v. *County of Banner,* 192 Neb. 816, 224 N.W. 2d 761 (1975); *Nicholson* v. *State,* 56 Ala. App. 3, 318 S. 2d 744 (1975); *Rassmussen* v. *State,* 18 Md. App. 443, 306 A. 2d 577 (1973). Thus, Petitioner's assertion that extensive division and confusion exists in the lower courts is unfounded.

Petitioner's misapprehension of the case law is based in part upon his reliance upon quotations taken out of con-

text regarding defendants who are "subject to possible imprisonment" or "in cases which may result in imprisonment." (Pet. 7, 8) In attempting to support his position, Petitioner erroneously interprets these phrases as referring to statutory sentencing alternatives rather than the prosepect of imprisonment arising from the trial court's predictive evaluation. As Chief Justice Burger stated in *Argersinger,* when a trial court engages in the predictive evaluation authorized by *Argersinger,* it determines the possibility of imprisonment—whether it might imprison the defendant if he is found guilty. 407 U.S. at 42. 92 S. Ct. at 2014. The cases referred to by Petitioner refer to the prospect of imprisonment engendered by that predictive evaluation; they do not purport to extend *Argersinger. See In re Di Bella,* 518 F. 2d 955, 959 (2d Cir. 1975); *Tate* v. *Kassulke,* 409 F. Supp. 651, 658 (W.D. Ky. 1975); *Tyson* v. *New York City Housing Authority,* 369 F. Supp. 513, 521 (S.D.N.Y. 1974); *Jenkins* v. *Commonwealth,* 491 S.W. 3d 636, 637 (Ky. 1973); *Trevino* v. *State,* 555 S.W. 2d 750 (Tex. App. 1977); *People* v. *Harris,* 45 Mich. App. 217, 206 N.W. 2d 478 (1973). In fact, the court in *Di Bella* clearly stated, that it is the imposition of imprisonment that fosters the need for procedural protection. 518 F. 2d at 959.

Petitioner's contention that courts in Kentucky, Texas, New York, Ohio, Massachusetts, Michigan, Washington, Wisconsin and Oregon have interpreted the Constitution to require appointment of counsel in misdemeanor cases resulting in fines is in error. (Pet. 7) The Kentucky Supreme Court in *Jenkins* v. *Commonwealth,* 491 S.W. 2d 636 (Ky. 1973), and the Appellate Court of Texas in *Trevino* v. *State,* 555 S.W. 2d 750 (Tex. App. 1977), merely reversed the convictions of defendants who had been im-

prisoned without benefit of trial counsel. The courts in New York, Ohio and Massachusetts have definitively refused to appoint counsel for misdemeanants who are not deprived of their liberty and the cases from those jurisdictions cited by Petitioner are entirely consistent with that refusal. *Compare People* v. *Farinaro,* 36 N.Y. 2d 283, 326 N.E. 2d 819, 367 N.Y.S. 2d 258 (1975); *State* v. *Ross,* 304 N.E. 2d 396 (Ohio App. 1973); *Commonwealth* v. *Boudreau,* 285 N.E. 2d 915 (Mass. 1972) *with People* v. *Weinstock,* 80 Misc. 2d 510, 363 N.Y.S. 2d 878 (1974) (memorandum opinion); *In re Fisher,* 39 Ohio 71, 313 N.E. 2d 851 (1974); *Commonwealth* v. *Barrett,* 322 N.E. 2d 89 (Mass. App. 1975). Similarly, *Artibee* v. *Cheboygan Circuit Judge,* 397 Mich. 54, 243 N.W. 2d 248 (1976), does not demonstrate confusion by the Michigan Supreme Court. Although the court in *Artibee* applied the right to counsel of Mich. Const. art. 1, § 17 (1963) to paternity defendants, it never relied upon *Argersinger* or the federal Constitution. Indeed, Justice Coleman expressly stated that *Argersinger* was inapplicable because the trial judge had excluded confinement as a possible penalty. 397 Mich. at 60-61, 243 N.E. 2d at 251 (concurring opinion). *People* v. *Studaker,* 387 Mich. 698, 700, 199 N.E. 2d 177, 179 (1972), in which the court specifically stated that the denial of counsel in criminal cases merely precludes the imposition of a jail sentence, is the controlling Michigan case.

Petitioner's reliance upon *Tetro* v. *Tetro,* 86 Wash. 2d 252, 544 P. 2d 17 (1975), and *McInturf* v. *Horton,* 85 Wash. 2d 704, 538 P. 2d 499 (1975), as an expansive interpretation of the Constitution by the Washington court is also misplaced. (Pet. 8, 13) In *Tetro,* which held that a contemnor sentenced to jail was entitled to counsel at his contempt hearing, the court stated that the sixth amendment test is "whether the individual will be deprived of

liberty." 86 Wash. 2d at 254, 544 P. 2d at 19 (original emphasis). In *McInturf,* the court construed its own rule, not the Constitution, to require appointment of counsel for defendants charged with crimes punishable by loss of liberty whether or not they are so punished. 85 Wash. 2d at 706-707, 538 P. 2d at 500. *McInturf* is inapposite not only because it did not interpret the Constitution, but also because the Washington court retreated from that holding in *State* v. *Francis,* 85 Wash. 2d 894, 540 P. 2d 421 (1975). In *Francis,* the Washington Supreme Court held that an uncounseled conviction for an offense for which imprisonment is a possible punishment is valid if the defendant was not actually imprisoned. *Id.*

Petitioner also mistakenly seeks support from two states that adopted broader protections than that guaranteed by the Constitution, without basing those protections upon constitutional construction. (Pet. 7, 8) In *State ex rel. Winnie* v. *Harris,* 75 Wis. 2d 547, 249 N.W. 2d 791 (1977), the Wisconsin court adopted an "imprisonment-in-law" standard, which it recognized was not constitutionally required. Similarly, the Oregon court in *Brown* v. *Multnomak County,* 280 Ore. 95, 570 P. 2d 52, *rev'g,* 29 Ore. App. 917, 566 P. 2d 522 (1977), said that a state statute required appointment of counsel in cases not resulting in imprisonment.

Petitioner further contends that the Illinois Supreme Court's decision in the instant case cannot be reconciled with this court's recent right to counsel cases. (Pet. 9-11) Reconciliation is not difficult, however, since this Court frequently reiterated in those opinions the "clear constitutional rule" that counsel must be appointed before a defendant "can be validly convicted and punished by imprisonment." *Faretta* v. *California,* 422 U.S. 806, 807, 95

S. Ct. 2525 (1975). In *Ludwig* v. *Massachusetts,* 427 U.S. 618, 627, 96 S. Ct. 2781, 2876 (1976), *North* v. *Russell,* 427 U.S. 328, 335, 96 S. Ct. 2709, 2712 (1976), and *Middendorf* v. *Henry,* 425 U.S. 25, 34, 96 S. Ct. 1281, 1287 (1976), as well as in *Faretta,* this Court clearly stated that the right to counsel attaches in misdemeaor cases if a sentence of imprisonment is to be imposed. In reviewing the right to counsel at a felony probation—revocation proceeding in *Gagnon* v. *Scarpelli,* 411 U.S. 778, 790, 93 S. Ct. 1976, 1763 (1973), cited by Petitioner, this Court stated that, "the presence and participation of counsel will probably be both undesireable and constitutionally unnecessary in most revocation hearings."

Petitioner next contends that this Court mandated an inherently arbitrary pre-trial evaluation procedure that abrogates the intent of state legislatures to allow a trial court the full range of sentencing options. (Pet. 12-14) It is inconceivable, however, that this Court would deliberately mandate a procedure by which trial courts would consistently violate the fourteenth amendment in reliance upon this Court's judgment. In fact, this Court indicated in *Argersinger,* that the pre-trial evaluation was not arbitrary when it stated that a trial judge "will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts." 407 U.S. at 40, 92 S. Ct. at 2014. Chief Justice Berger's concurring opinion in *Argersinger* similarly expressed confidence in trial courts' abilities to evaluate cases on a rational basis consistent with the Constitution:

> Trial judges sitting in petty and misdemeanor cases —and prosecutors--should recognize exactly what will be required by today's decision . . . the prediction is not one beyond the capacity of an experienced judge, aided as he should be by the prosecuting officer. 407 U.S. at 42, 92 S. Ct. at 2014.

Even prior to its rejection of Petitioner's contentions in the instant case, the Illinois Supreme Court implicitly recognized that trial judges are capable of fairly evaluating prior to trial the possibility of post-trial incarceration when it specifically authorized the predictive evaluation procedure in the right to jury trial context. *City of McLean* v. *Kickapoo Creek, Inc.,* 51 Ill. 2d 353, 282 N.E. 2d 720 (1973).

The courts of review below recognized that the pre-trial screening process required by the predictive evaluation procedure is not a departure from traditional sentencing methods. The appellate court stated that "in its predictive evaluation, the trial court is actually exercising the full range of its legislatively-afforded sentencing options by discarding some of those options in its search for the most appropriate sentencing alternative." *People* v. *Scott,* 36 Ill. App. 3d 394, 310, 343 N.E. 2d 517, 522 (1st Dist. 1976). Certainly, the existence of sentencing options did not previously preclude a trial court from eliminating sentencing alternatives due to the lack of seriousness of the offense charged. The legislatures established sentencing alternatives so that the trial courts could choose among those alternatives. It makes no difference to this statutory scheme that the right to appointed counsel depends upon these sentencing decisions.

II

PETITIONER ASKS THIS COURT TO REVIEW HIS CLAIM THAT HIS TRIAL WAS UNFAIR, BUT NEVER SPECIFIES AN ERROR UPON WHICH THIS CLAIM MAY BE BASED; THE STATE IS THUS UNABLE TO SUBSTANTIVELY RESPOND TO THIS VAGUE ASSERTION. IN ANY EVENT, THE COURT IS WITHOUT JURISDICTION TO CONSIDER THIS ISSUE BECAUSE IT HAS BEEN WAIVED.

Petitioner never alleged or argued in the state courts of review that he had been denied a fair trial. Consequently, neither the Illinois Supreme Court nor the Appellate Court of Illinois ruled upon this claim. *People* v. *Scott,* 68 Ill. 2d 269, 369 N. E. 2d 881 (1977), *aff'g,* 36 Ill. App. 3d 304, 343 N.E. 2d 517 (1st Dist. 1976). It is for this reason that Petitioner was unable to specify the lower courts' treatment of this issue as required by Supreme Court Rule 23(f). (Pet. 3-4).

In determining Supreme Court jurisdiction over issues in appeals from state courts, this Court has held that it is the obligation of each state to prescribe the jurisdiction of its appellate courts as to local, state and federal issues. *John* v. *Paullin,* 231 U.S. 583, 585 (1913). Illinois has determined that points not argued in an appellant's brief in the reviewing court are waived. Illinois Supreme Court Rules 341(e)(7), 612(j), Ill. Rev. Stat. ch. 110A, §§ 341(e)(7), 612(j) (1975). When a litigant has raised an issue for the first time in this court despite a state rule providing that issues not raised in appellants' briefs are waived, this Court has refused to review the improperly presented claim. *Beck* v. *Washington,* 369 U.S. 541, 549-553 (1962).

Moreover, as Justice Harlan stated, "The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional." *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.,* 391 U.S. 308, 334 (1968) (dissenting opinion).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

May 5, 1978.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1177

AUBREY SCOTT,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR THE PETITIONER

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PETITION FOR CERTIORARI FILED FEBRUARY 21, 1978
CERTIORARI GRANTED MAY 30, 1978

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Illinois affirming the decision of the Appellate Court of Illinois is reported at 68 Ill. 2d 269, 369 N.E.2d 881 (1977). It is reproduced in the Appendix to the Petition for Certiorari at p. 1a.

The opinion of the Appellate Court of Illinois, First District, entered on February 26, 1976, affirming petitioner's conviction, is reported at 36 Ill. App. 3d 304, 343 N.E.2d 517 (1976). It is reproduced in the Appendix to the Petition for Certiorari at p. 6a.

JURISDICTION

The decision of the Supreme Court of Illinois was entered on October 5, 1977. The Petition for Rehearing was denied on November 23, 1977. The Petition for Writ of Certiorari was filed on February 21, 1978. Certiorari was granted on May 30, 1978. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1) Whether the Sixth and Fourteenth Amendments to the United States Constitution guarantee the right to counsel when a defendant is charged with an offense punishable under state law by imprisonment, regardless of whether the defendant is in fact imprisoned?

2) Whether the trial of Petitioner Scott without the assistance of counsel was so unfair as to deny due process of law?

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Constitution of the United States, Amendment XIV, Section 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On January 31, 1972, petitioner Aubrey Scott appeared without counsel before the Circuit Court of Cook County, Illinois, on a charge of theft in violation of Ill. Rev. Stat. Ch. 38, § 16-1(A)(1) (1972). This is a misdemeanor which carries a possible sentence of a fine not to exceed $500 or imprisonment not to exceed one year, or both.

When Scott approached the bench the Judge advised him that he was charged with the offense of theft. (A. 6) The Record does not indicate that Scott was given a copy of the complaint, which alleged in substance that Scott had on or about January 19, 1971, committed the offense of theft in that he knowingly obtained or exerted unauthorized control over a sample case and address book worth $13.68, the property of F. W. Woolworth, with the intent to deprive F. W. Woolworth permanently of the use and benefit of said property in violation of Ill. Rev. Stat. Ch. 38, § 16-1(A)(1). (A. 1-2) Because the complaint was filed on January 21, 1972, and the initial and only court appearance was 10 days later, it is probable that the 1971 date alleged both in the complaint and by the complainant at trial as the year of the offense was in error, although the Record is not conclusive on this point.

The Judge first asked Scott whether he was "going to be ready for trial," but when Scott asked if he meant "am I ready?" the Judge said "yes." Scott answered that he was ready for trial. The court clerk then arraigned Scott, telling him he was charged with theft and asking whether Scott was ready for trial and how he pleaded to the charge. Scott replied that he was

ready for trial and pleaded not guilty. The clerk then asked whether Scott wanted "to be tried by this court or before a jury," to which Scott replied "Well, it doesn't matter. Right here will be okay with me." (A. 7) Scott was never advised that he had a right to representation by counsel and, if unable to afford counsel, a right to appointed counsel.

The one witness for the prosecution, a store security guard, then testified to his version of the incident. On January 19, 1971, he observed Scott ask a sales girl to unlock some attache cases, which she did. He then watched Scott for between fifteen and twenty minutes while Scott walked back and forth by the sales girls with a ten dollar bill in his hand. He observed Scott pick up an address book and put it in his pocket. After watching Scott for five more minutes, the guard walked out on State Street where a few minutes later Scott walked out with "the attache case." When the guard ordered Scott back in the store, Scott told him the case belonged to him. The guard further testified that prior to walking out of the store Scott had put a number of articles inside of the case, including ones Scott had apparently brought to court. The guard identified what was apparently an attache case as Woolworth's property and said he believed it had a tag indicating the value as twelve ninety-nine. After the State offered unidentified matter into evidence, the guard was excused. Scott did not ask the guard any questions, nor was he told he could do so.

The State then rested and immediately thereafter the Judge asked Scott what he wished to say. (A. 8) Scott testified that he had put things in the case to see if they would fit and that, as he was partially blind, he could not find the sales girl, but he was constantly looking for her. When someone grabbed Scott and accused him of

being a shoplifter Scott denied it and showed him the money he said he had to pay for whatever he was buying. The police then came, handcuffed him and took him to jail.

The State's Attorney then rested on the State's case. The Judge asked the State's Attorney to ask more questions because "There's a lot of questions I want to know." (A. 9) The State's Attorney, however, told the Judge to ask the questions, observing that he felt the State had made its case. The Judge then said there were still questions as to how much money Scott had, what he did with the money, whether he offered the money to anybody and whether he ever saw a sales clerk. Scott responded that he had almost $300 in his pocket and that he did not see the sales girl because she did not have a counter to work behind. The Judge then directly questioned Scott as to where he was when he was arrested and what he was going to buy with the ten dollar bill. Scott replied that he was inside the store when he was stopped and that he was going to pay the girl with the ten dollar bill or with more if she said it, as he had it to pay. Immediately after this statement the Judge said "I don't believe you, sir. Finding of guilt." (A. 10)

The court sergeant then stated that Scott had been convicted of petty larceny in 1957, for which he had been sentenced to thirty days in the House of Correction. Scott responded that that was thirteen years ago and that he was not guilty of trying to make a theft. The State's Attorney then recommended probation, but the Judge pronounced a sentence of "Fifty and no costs." (A. 10)

Through counsel, Scott filed a timely notice of appeal and a motion for a free transcript of the trial proceedings, supported by an affidavit of indigency, which motion was granted. The Appellate Court of Illinois found that the reach of the Sixth Amendment right to counsel is limited to defendants who are in fact imprisoned, and therefore Scott had no constitutional right to an appointed trial counsel. (Appendix to cert. petition, 13a-14a) The Appellate Court also rejected Scott's statutory argument that he had a right to appointed counsel under Ill. Rev. Stat. Ch. 38, § 113-3(b), which requires the court to appoint the Public Defender for indigents desiring counsel "in all cases, except where the penalty is a fine only. . . ." The Supreme Court of Illinois affirmed on both grounds. (Appendix to cert. petition, 1a-6a).

SUMMARY OF ARGUMENT

A misdemeanor-theft prosecution is a "criminal prosecution" within the terms of the Sixth Amendment, whether or not the defendant is imprisoned. The rationale of *Gideon v. Wainwright*, 372 U.S. 335 (1963), in making the Sixth Amendment right to counsel obligatory upon the States as an essential element of due process does not depend upon the seriousness of the particular criminal prosecution. The Court in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), rejected a limitation on any Sixth Amendment right, except the right to jury trial, on the basis of the seriousness of the criminal case. However, even with respect to the historically unique right to jury trial, the relevant criterion for determining whether an offense is serious enough to warrant the protection of the right is the penalty authorized by law rather than the penalty imposed in fact.

Rejection of an imprisonment-in-fact requirement for the right to counsel in this case would not necessarily require extension of the right to all legal violations punishable by imprisonment, such as minor traffic violations. However, whatever the Court eventually may determine to be the outer reaches of the definition of a "criminal prosecution" for the purposes of the Sixth Amendment, petitioner's prosecution clearly fits that definition since misdemeanor-theft has all of the many indicia of a traditional criminal offense.

As a matter of legal practice as well as legal principle it would be illogical to make the right to counsel the one Sixth Amendment right that is restricted by an imprisonment-in-fact requirement since meaningful exercise of the other Sixth Amendment rights, especially the

right to jury trial, depends upon exercise of the right to counsel.

The trial court violated petitioner's Sixth Amendment right to counsel by not advising him of his right to representation either by his own hired counsel or by appointed counsel if indigent. Scott's failure to request such representation did not waive his right to counsel.

Assuming *arguendo* that the Sixth Amendment right to counsel does not reach petitioner's misdemeanor-theft prosecution, the denial of counsel nevertheless violated due process of law. Whatever due process test the Court finds appropriate to this proceeding, the process that is due requires those safeguards that are essential for an accurate adjudication of fact. In light of the Court's findings in *Argersinger*, it is no longer subject to dispute that counsel is as essential for a fair trial in a misdemeanor prosecution as it is in a felony prosecution.

The governmental costs of providing fair fact-finding procedures have been a factor in the Court's administrative due process cases only where the costs have been of an extraordinary nature. The overriding governmental interest in this case, however, is not one of cost, but one of assuring that criminal trials result in fair determinations of guilt or innocence. Moreover, if judges must decide before trial which misdemeanor defendants do or do not require counsel and, therefore, which may or may not be imprisoned, governmental interests will suffer in several ways. Sentencing will become uninformed guess-work and a usurpation of legislative intent. Where convictions are uncounseled, non-imprisonment penalties, such as a fine, probation, or suspended sentence will become of dubious effectiveness. The State's interest in using prior convictions for collateral purposes such as impeachment, enhancement of

sentence, or revocation of probation or parole, will be minimized where those convictions were uncounseled. Deciding before trial that certain indigent misdemeanor defendants will not be afforded the right to appointed counsel and will therefore be immunized from imprisonment will also create serious equal protection problems.

Reliable evidence as to the added cost of providing a right to counsel in misdemeanor cases punishable by imprisonment does not exist. However, several respected commissions and studies that have examined the question have determined that the cost would not be excessive and that extension of the right in such cases would be worthwhile. Twenty-two States have already done so. Costs may also be saved by the greater efficiency from having trained counsel on both sides.

The violation of petitioner's right to equal protection of the law from the denial of appointed counsel at trial is even greater than the equal protection violation found in the denial of appointed counsel on appeal in *Douglas v. California*, 372 U.S. 353 (1963), since the harm from the denial of trial counsel is more severe than the harm from the denial of appellate counsel.

Should the Court approve a case-by-case determination of each misdemeanor defendant's right to counsel, that determination must satisfy the requirements of due process both because it jeopardizes an interest of defendant deserving due process protection and because it creates a substantial risk of error and prejudice without such protection. The protected interest is defendant's greatly increased likelihood of acquittal as a result of representation by counsel. The pre-trial determination of each defendant's right to counsel runs substantial risk of error because it requires the evaluation of several com-

plex, interrelated factors, including the difficulties of presenting a competent defense, the capacity of the defendant to represent himself and the likelihood of imprisonment upon conviction. The risk of prejudice from the pre-trial determination of the right to counsel arises both from the trial judge's exposure to unfavorable presentencing information about the defendant and the judge's need to rely upon *ex parte* communications with the prosecution in order to attain such information. The procedural safeguards required for an accurate, nonprejudicial determination of each defendant's right to counsel are: 1) a determination made pursuant to an on-the-record adversary hearing at which the defendant may object to improper evidence about himself, may argue why he needs counsel for his defense, and, where incapable of so arguing, may be heard through counsel regarding the reasons his defense requires counsel; 2) written reasons by the judge to support a refusal to appoint counsel, and, 3) a trial before a judge other than the one who heard any unfavorable inadmissible information about the defendant before trial.

To reverse petitioner's conviction because his trial was unfair, rather than because he was denied the right to counsel, would establish a principle of judicial review that both would be contrary to the premises of *Gideon* and *Argersinger* and would be as uncertain, ineffective, and as inequitable to indigents as the special circumstances rule of *Betts v. Brady*, 316 U.S. 455 (1942). Nevertheless, the unfairness in petitioner's trial was so pervasive that reversal is required under many of the criteria of fundamental unfairness established in the post-*Betts*, pre-*Gideon* line of Supreme Court cases.

ARGUMENT

I.

THE SIXTH AMENDMENT RIGHT TO COUNSEL APPLIES IN ALL STATE CRIMINAL PROSECUTIONS REGARDLESS OF WHETHER IMPRISONMENT RESULTS.

The Sixth Amendment specifies in uniformly mandatory terms the basic protections the Framers thought indispensable to a fair trial. *Schneckloth v. Bustamonte*, 412 U.S. 218, 242 (1973); *Farretta v. California*, 422 U.S. 806, 838 (1975) (Burger, C.J., dissenting). It applies the right to counsel "in all criminal prosecutions." It does not apply the right, as the State of Illinois would have it, 'in all criminal prosecutions except for misdemeanor prosecutions not resulting in imprisonment.' Because the Sixth Amendment right to counsel is an essential element of fundamental fairness, it has been incorporated against the States. *Gideon v. Wainwright*, 372 U.S. 335 (1963). A decision not to apply the right to counsel to petitioner's criminal prosecution because no imprisonment resulted would contradict not only the language of the Amendment and the rationale of its incorporation by *Gideon*, but it would also depart from the Court's unwavering application of the right to counsel at the trial phase of criminal prosecutions regardless of the seriousness of the offense.

In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court rejected a proposed exemption from the right to counsel for petty offense prosecutions that have an authorized penalty of less than six months imprisonment. The Court found no historical support for a limitation of the Sixth Amendment right to counsel on the basis of the seriousness of the criminal case. 407 U.S. at

30. Although the right to jury trial had been limited to serious offenses because it "has a different genealogy and is brigaded with a system of trial to a judge alone," 407 U.S. at 29, the Court found in *Argersinger* that it has never limited the application to the States of any of the other Sixth Amendment rights on the basis of the seriousness of the offense charged. 407 U.S. at 27-30. *Cf. In re Oliver*, 333 U.S. 257 (1948) (right to a public trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confrontation); *Washington v. Texas*, 388 U.S. 14 (1967) (right to compulsory process of witnesses); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (right to a speedy trial); *Groppi v. Wisconsin*, 400 U.S. 505 (1971) (right to an impartial jury); *Henderson v. Morgan*, 426 U.S. 637 (1976) (right to be informed of the nature and cause of the accusation).

Although the Court has refused to create an exception to the right to counsel for petty offenses based on the length of imprisonment authorized by law, Illinois purports to recognize a form of "ultra-petty offense" exception based on the lack of imprisonment imposed in fact. A decision upholding this principle would not only be devoid of support in the language and history of the Sixth Amendment, but it would also be inconsistent with the primary measure the Court has previously applied in determining the seriousness of criminal offenses.

The few cases that have considered the seriousness of a criminal prosecution in determining the applicability of constitutional safeguards demonstrate that the punishment authorized by law, not the punishment imposed in fact, is the critical determinant of whether an offense is sufficiently serious to warrant constitutional safeguards. Thus, in *Frank v. United States*, 395 U.S. 147, 149 (1969), the Court summarized:

> In ordinary criminal prosecutions, the severity of the penalty authorized, not the penalty actually imposed, is the relevant criterion. In such cases, the legislature has included within the definition of the crime itself a judgment about the seriousness of the offense.

In *Duncan v. Louisiana*, 391 U.S. 145, 162 n.35 (1968), the Court explicitly rejected an argument, based on *Cheff v. Schnackenberg*, 384 U.S. 373 (1966), that the penalty actually imposed, rather than the sentence authorized, is the relevant criterion in distinguishing between serious and petty offenses for purposes of the right to a jury trial.[1] The Court in *Duncan* noted that *Cheff*, a criminal contempt case, "does not reach the situation where a legislative judgment as to the seriousness of the crime is imbedded in the statute in the form of an express authorization to impose a heavy penalty for the crime in question." 391 U.S. at 162 n.35. *See also, Baldwin v. New York*, 399 U.S. 66, 68-70 (1970).

The Court has also applied the authorized imprisonment standard with respect to rights other than the right to a jury. In *United States v. Moreland*, 258 U.S. 433 (1922), the Court, in analyzing the reach of the Fifth Amendment requirement of presentment or indictment by a grand jury, stated: "[T]he test is not the imprisonment which *is* imposed, but that which *may be* imposed under the statute." *Id.* at 437 (quoting *Fitzpatrick v. United States*, 178 U.S. 304, 307 (1900)). *See*

[1] Even in contempt cases, Mr. Justice Douglas would not consider the sentence actually imposed as a measure of the seriousness of an offense: "The relevance of the sentence, as we have seen, is that it sheds light on the seriousness with which the community and the legislature regard the offense. Reference to the sentence actually imposed in a particular case cannot serve this purpose." *Cheff v. Schnackenberg*, 384 U.S. 373, 390-391 (Douglas, J., dissenting).

also Mackin v. United States, 117 U.S. 348, 351 (1886). In determining the procedural safeguards required in a juvenile delinquency proceeding, the Court in *In re Gault*, 387 U.S. 1, 42 (1967), required the right to counsel because of the "potential commitment" in such proceeding, not because Gault was in fact committed.

Although the Court did not discuss the type of criminal penalties necessary to invoke the Sixth Amendment right to counsel in *Gideon v. Wainwright*, 372 U.S. 335 (1963), it is significant that the Court did not limit the right to cases in which imprisonment is in fact imposed.[2] Rather, the Court repeatedly emphasized the necessity of counsel in order to protect one who is "charged with crime." 372 U.S. at 344. The Court has also never interpreted *Gideon* as restricting the right to counsel in terms of the penalty actually imposed, but instead, has construed it as applying to felony cases in general. *Argersinger v. Hamlin*, 407 U.S. 25, 31-32 (1972).[3] *See also* concurring opinions of Harlan, J. and Clark, J. in *Gideon v. Wainwright*, 372 U.S. at 351 and 348-349.

In sum, the Court has never held the seriousness of a state criminal prosecution to be determinative of the

[2] Similarly, the Court has never limited the Sixth Amendment right to counsel in federal criminal trials because of the lack of actual imprisonment, but rather, has described the right as applying "in every case, whatever the circumstances," *Foster v. Illinois*, 332 U.S. 134, 136-137 (1947), or "in all criminal proceedings," *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938).

[3] The Court in *Argersinger* did not extend the right to counsel to cases in which imprisonment is not imposed. However, the Court's refusal in *Argersinger* to "consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved . . ." 407 U.S. at 37, indicates that the Court was not endorsing an exception to the right to counsel for cases not resulting in imprisonment. *Cf. Gideon v. Wainwright*, 372 U.S. 335, 343 (1963).

reach of any Sixth Amendment right, except the right to a jury trial. Moreover, whenever the seriousness of a prosecution for any crime, except contempt, has been a factor in applying constitutional safeguards, the relevant test of seriousness has been the length of imprisonment authorized by law, not the imprisonment imposed in fact.

The Court's rejection of an imprisonment-in-fact requirement for the right to counsel in this case would not necessarily require extension of the right to every defendant charged with an offense punishable by imprisonment. Certain types of offenses, referred to variously as quasi-criminal, public welfare or regulatory offenses, which would include minor traffic violations, could conceivably not be deemed "criminal prosecutions" within the meaning of the Sixth Amendment, even though they are punishable by imprisonment.[4] *Cf. People v. Letterio*, 16 N.Y.2d 307, 266 N.Y.2d 307, 266 N.Y.S.2d 368 (1965); *but see Baker v. City of Fairbanks*, 471 P.2d 386, 402 (Alas. 1970); *See also Middendorf v. Henry*, 425 U.S. 25, 38 (1976).

Regardless, however, of what the Court may eventually find to be the outer reaches of the Sixth Amendment's application to criminal prosecutions, the misdemeanor-theft prosecution of petitioner Scott is a "criminal prosecution" within any reasonable construction of the Amendment's language. All of the

[4] Petitioner, however, does not advocate such an approach, because it would substitute essentially arbitrary labels for the seriousness of potential punishments actually faced by defendants, a factor which the Court in *In re Gault*, 387 U.S. 1, 27-30 (1967), and *Specht v. Patterson*, 386 U.S. 605, 608-9 (1967), found determinative of the need for procedural safeguards. This approach would also disregard the criterion deemed most important in the Sixth Amendment jury trial cases—the seriousness with which a legislature views an offense when it authorizes imprisonment for its violation. *Supra* pp. 13-15.

traditional indicia of criminal prosecutions are satisfied by the theft charge brought against Scott. Theft, or larceny, was a felony at common law, *Jerome v. United States*, 318 U.S. 101, 108 n.6 (1943). It was also considered infamous at common law because it exhibited "particular turpitude and baseness of character" and because of the severe nature of its punishment. *Ex parte McClusky*, 40 F. 71, 74 (Cir. Ct. D. Ark. 1889). It requires proof of *mens rea*. Ill. Rev. Stat. Ch. 38, §§ 16-1, 4-3, 4-4 and 4-5 (1971). Perhaps, most important, theft calls forth the moral condemnation of the community, a point emphatically made by the Court in *Morissette v. United States*, 342 U.S. 246, 260 (1952):

> Stealing, larceny, and its variants and equivalents, were among the earliest offenses known to law that existed before legislation; they are invasions of rights of property which stir a sense of insecurity in the whole community and arouse public demand for retribution. . . .

See also Middendorf v. Henry, 425 U.S. 25, 39 (1976) (larceny carries "a stamp of 'bad character' with conviction."). The maximum sentence of one year imprisonment set by the Illinois misdemeanor-theft statute also shows the seriousness with which the community regards the crime. *Cf. Frank v. United States*, 395 U.S. 147, 148 (1969). Furthermore, significant adverse collateral consequences attach to a misdemeanor-theft conviction in Illinois, as in most States. *Infra* 44 note 25. Finally, misdemeanor-theft prosecutions have all of the "invariable attributes" of the criminal trial process, the adversary nature of which "is one of the touchstones of the Sixth Amendment right to counsel. . . ." *Middendorf v. Henry*, 425 U.S. 25, 40 (1976) (footnote omitted).[5]

[5] The Court in *Gagnon v. Scarpelli*, 411 U.S. 778, 789 (1973), identified those attributes as the following: "In a criminal

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Considered individually or together, these factors leave no doubt that Scott's prosecution for theft was a "criminal prosecution" within the meaning of the Sixth Amendment.

Aside from the explicit language of the Sixth Amendment, it would be anomalous to make the right to counsel the one Sixth Amendment right dependent for its application upon the imprisonment-in-fact standard, since it is the right to counsel that makes the other Sixth Amendment rights effective. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."); Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L.R. 1, 8 (1956) ("Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.")

The illogic of making the right to counsel the subordinate Sixth Amendment right is most clearly illustrated by the resulting functional negation of the right to a jury trial. Although all defendants charged with misdemeanors punishable by over six months imprisonment have the right to a jury trial, *Baldwin v. New York*, 399 U.S. 66 (1970), according to the Illinois Supreme Court only those ultimately imprisoned are entitled to the assistance of counsel in presenting their case to the jury. Although the court clerk asked Scott if he wanted to be tried by a jury (A. 7), this was an

[b] *continued*
trial, the State is represented by a prosecutor; formal rules of evidence are in force; a defendant enjoys a number of procedural rights which may be lost if not timely pressed; and, in a jury trial, a defendant must make a presentation understandable to untrained jurors. In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics."

empty gesture under the circumstances, for if Scott had not waived this right, he would have been faced with a trial that, as a layman, he was clearly incapable of handling. As Mr. Justice Douglas noted, concurring in *Carnley v. Cochran*, 369 U.S. 506, 524 (1962), a jury trial for one without counsel becomes "a labyrinth he can never understand nor negotiate . . . a trap for the layman because he is utterly without ability to make it serve the ends of justice." *See also Argersinger v. Hamlin*, 407 U.S. 25, 46 (1972) (Powell J., concurring in result) ("If there is no accompanying right to counsel, the right to trial by jury becomes meaningless.")

The effectiveness of the other Sixth Amendment rights is equally dependent upon the assistance of counsel, as the trial record below demonstrates. Scott was not advised of and did not exercise his right to cross-examine the one witness against him, although the right to confrontation is fundamental to fairness and has not been limited solely to imprisoned defendants. *Pointer v. Texas*, 380 U.S. 400 (1965); *Brookhart v. Janis*, 384 U.S. 1 (1966). Similarly, he was not advised of nor did he exercise his right to compulsory process for obtaining witnesses in his favor, although the Court had applied that right to the States in *Washington v. Texas*, 388 U.S. 14 (1967). Nor was Scott given a copy of the complaint, advised of what he was alleged to have taken, nor told of the elements of, or the penalty for, the offense with which he was charged—all clearly contrary to the intent of the Sixth Amendment, as set forth in *Smith v. O'Grady*, 312 U.S. 329, 333-334 (1941), and *Henderson v. Morgan*, 426 U.S. 637, 645 (1976). Finally, although the trial judge's admitted doubts about the sufficiency of the State's proof indicate the importance of closing argument in order both to capitalize on those doubts and to "correct a premature misjudgment and

avoid an otherwise erroneous verdict," *Herring v. New York*, 422 U.S. 853, 863 (1975), the judge by his peremptory ruling gave Scott no notice of, nor opportunity to exercise, his right to make a closing summation, contrary to the Court's decision in *Herring*. *See infra* Part V, pp. 62-64, for additional grounds of unfairness in Scott's trial. Because it is impossible to know what the effect of these fundamental rights would have been had counsel been present to exercise them, harm to the defendant is irrebuttably presumed from the denial of the right to counsel itself. *Holloway v. Arkansas*, ... U.S. ....., 98 S.Ct. 1173, 1181, 1182 (1978). Thus, if a defendant who is fined, but not imprisoned, for a misdemeanor punishable by imprisonment is to be given any of the Sixth Amendment rights that are fundamental to a fair trial, the practical demands of the adversary criminal trial process require that one of those rights be the right to counsel. *Cf. Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973).

Once the Sixth Amendment right to counsel is held to apply to Scott's misdemeanor prosecution, it necessarily follows that the trial judge violated that right by failing to advise Scott of his right to appointed counsel if indigent, since a fundamental constitutional right cannot be denied a defendant because of his financial inability to exercise that right. *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963). However, the trial court violated Scott's right to counsel not only because it failed to advise him of his right to appointed counsel if indigent, but also because it neglected to inform him of his right to be represented by his own counsel at his own expense. In *Chandler v. Fretag*, 348 U.S. 3, 9 (1954), the Court held that a defendant under a sentence of life imprisonment as an habitual criminal had an unqualified right to be heard through his own counsel. *See also Powell v.*

Alabama, 287 U.S. 45, 68-69 (1932). To limit that right in misdemeanor prosecutions because the defendant is not imprisoned would serve no valid state interest, would subject the defendant to the same fundamental unfairness found unacceptable in *Gideon* and *Argersinger*, and would countenance a procedure in misdemeanor cases not even permitted by the court of the Star Chamber, BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS, 8-9 (1955). *Cf. In re Gault*, 387 U.S. 1, 29 (1967).

Scott, of course, requested neither the appointment of counsel nor the opportunity to be represented by his own hired counsel. However, Scott's silence in this regard cannot be construed as a valid waiver of his right to counsel since the State has the burden of demonstrating that the failure to request counsel was an "intelligent relinquishment of a known right or privilege," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), and this it cannot do on the basis of a silent record. *Carnley v. Cochran*, 369 U.S. 506, 513-517 (1961); *Cf. Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973).

In sum, a construction of the right to counsel "in all criminal prosecutions" that would deny this right to defendants who are not imprisoned for misdemeanors punishable by imprisonment would be aberrant in several respects. It would be inconsistent with the Court's application of all other Sixth Amendment rights to state prosecutions, other than contempt, without regard for the sentence actually imposed. It would disregard *Argersinger's* rejection of a petty offense exception to the reach of the right to counsel. It would ignore numerous Court decisions measuring the seriousness of an offense by the severity of the penalty authorized by the legislature. It would make the Sixth Amendment right that is most critical to procedural fairness, the most

restrictive in availability. It would for no reason qualify what the Court has held to be the unqualified right to be heard through one's own counsel. Most important, it would ignore the essential insight of *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."

II.

DUE PROCESS OF LAW REQUIRES THE RIGHT TO COUNSEL AT A MISDEMEANOR-THEFT TRIAL REGARDLESS OF WHETHER THE DEFENDANT IS IN FACT IMPRISONED.

A.

The Decisive Factor In Determining Whether A Defendant Has A Due Process Right To Counsel In A Misdemeanor Trial Is Whether Counsel Is Necessary For A Fair And Accurate Judicial Fact-Finding Process.

The Sixth Amendment defines the basic protections that the Framers thought indispensable to a fair trial, without which "justice will not 'still be done.'" *Johnson v. Zerbst*, 304 U.S. 458, 462-463 (1938) (footnote omitted); *Schneckloth v. Bustamonte*, 412 U.S. 218, 242 (1973). The Court, therefore, does not engage in a balancing of individual and governmental interests in deciding whether the full measure of Sixth Amendment protections apply. If a prosecution for a misdemeanor punishable by imprisonment is a "criminal prosecution" within the intendment of the Sixth Amendment, the analysis of this case need thus go no further, since the right to the assistance of counsel is embodied in the Amendment. However, assuming *arguendo* that such a prosecution is deemed something other than criminal, the right to counsel is nevertheless still required under the

Fourteenth Amendment because a serious misdemeanor prosecution, such as theft, jeopardizes interests that both deserve due process protection and require the assistance of counsel to achieve such protection.

The first question in any due process analysis—whether the nature of the liberty or property interest at stake warrants due process protection, *Board of Regents v. Roth*, 408 U.S. 564, 570-571 (1972)—is easily resolved in the context of a misdemeanor-theft conviction in which no imprisonment is imposed. The stigma, the fine, the possibility of probation and the collateral disabilities caused by any misdemeanor conviction are sufficiently severe state-inflicted penalties to warrant whatever procedural safeguards are essential to assure that these deprivations result only from a fundamentally fair fact-finding process. See *infra* pp. 42-46.

The second part of the due process analysis is not as simply resolved because it is unclear exactly what test should be used to determine the process due in a proceeding that is conducted as a criminal trial, but is nevertheless deemed not criminal for the purposes of the Sixth Amendment. In *In re Gault*, 387 U.S. 1 (1967), the Court analyzed the safeguards required by due process in a non-criminal proceeding that is closely analogous to petitioner's misdemeanor trial. The Court based its finding of a due process right to counsel in a juvenile delinquency hearing on two factors: the hearing's possible consequence of commitment, 387 U.S. at 41, and the juvenile's need for "the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings and to ascertain whether he has a defense and to prepare and submit it." 387 U.S. at 36. Both factors are present with even greater force in petitioner's misdemeanor prosecution. First, he was charged with an offense that has a

statutory maximum sentence of one year's imprisonment in a penal institution. Second, he is a layman who had to defend against the prosecutor's case alone without even the pretense of a specially trained judge mandated to protect his best interests. *Gault's* importance to the recognition of a due process right to counsel in misdemeanor cases is made even clearer by *Argersinger's* explicit reliance on *Gault* in concluding that counsel is needed for a fair trial in prosecutions for crimes less serious than felonies. 407 U.S. at 33-34.

In *Gault* the Court did not weigh in its due process analysis the governmental cost of providing counsel. However, in its decisions analyzing the process due in administrative proceedings the Court has weighed the factor of governmental cost against the factors of the individual interests at stake and the relation of the requested procedural safeguard to the truth-seeking function. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Given both the uniquely grievous individual harm resulting from a misdemeanor-theft conviction and the formal procedures and rules of law that must be followed by both sides in a misdemeanor trial, the due process analysis used in *Gault*, rather than that used in *Mathews*, is appropriate to the type of judicial proceeding required in a misdemeanor prosecution.[6] However,

[6] *Mathews* itself indicates that its test was designed for the needs of assuring fairness in administrative, rather than judicial, fact-finding: "The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness." 424 U.S. at 348. More recently, the Court in *Dixon v. Love*, 431 U.S. 105, 115 (1977), indicated that the standards appropriate for determining the requisites of procedural due process in the administrative setting are different from the standards appropriate for settings where the judicial model is applicable. Moreover, the critical question in most of the Court's administrative due process decisions has

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the question of whether the *Mathews* balancing test would unduly defer to the governmental cost factor in determining the process due in a misdemeanor prosecution not deemed criminal under the Sixth Amendment need not be resolved in this case. For, even when the governmental cost factor is weighed in the due process balance, the other two factors on the scale decisively demonstrate that the right to counsel is an indispensable element of due process in misdemeanor trials.

B.

Because It Is Undisputed That The Assistance Of Counsel Is Essential To A Fair Misdemeanor Trial, Assertions That Appointed Counsel Is Too Costly Cannot Outweigh The Petitioner's Due Process Right To Counsel.

Assuming *arguendo* the appropriateness of the *Mathews v. Eldridge* due process balancing test, its outcome in this case is determined by the weight to be accorded the first factor in that test—the relation of the requested safeguard to the truth-seeking function. Where the procedural safeguard in question is deemed essential to a fair administrative fact-finding process, the Court has required that safeguard to be provided, unless either of two conditions are shown: (a) there are emergency or extraordinary reasons why the government cannot afford fair procedures,[7] *Board of Regents v.*

[6] *continued*
been whether the procedures necessary for a fair adjudication of fact must be provided in advance of the deprivation or can be postponed until afterwards. *Cf. Memphis Light, Gas and Water Div. v. Craft*, ... U.S. ....., 98 S.Ct. 1554, 1565 (1978). However, there is no afterwards for procedural fairness at the judicial trial stage. Lack of needed counsel is always harmful and the degree of harm cannot be gauged on appeal. *Cf. Holloway v. Arkansas*, ... U.S. ....., 98 S.Ct. 1173, 1182 (1978).

[7] The Court has expressed this governmental burden in a variety of ways. The "rather ordinary costs" of time, effort,

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Roth, 408 U.S. 564, 570 n.7 (1972); or (b) the individual deprivation is of a *de minimis* nature. *Goss v. Lopez*, 419 U.S. 565, 576 (1975). Only where the procedural safeguards requested have not been essential to a fair fact-finding process has the Court found those safeguards to be outweighed by the extra costs they would place on government. *Cf. Memphis Light, Gas and Water Div. v. Craft*, ... U.S. ....., 98 S.Ct. 1554, 1565 (1978).

The State has never disputed in this case the proposition that a misdemeanor trial cannot be a fair fact-finding process unless the defendant as well as the State has the assistance of counsel. Such an assertion would be untenable in light of the Court's many opinions concerning the right to counsel since *Gideon v. Wainwright*, 372 U.S. 335 (1963). Denial of the right to counsel, the Court has stated, goes to "the very integrity of the fact-finding process," *Linkletter v. Walker*, 381 U.S. 618, 639 (1965), and "substantially impairs its truth-finding function . . . ." *Williams v. United States*, 401 U.S. 646, 653 (1971). Recent decisions denying the right to counsel in simple probation revocation hearings, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), and summary courts-martial proceedings, *Middendorf v. Henry*, 425 U.S. 25 (1976), have only served to clarify the Court's understanding that in the very different context of a traditional criminal trial the invariable attributes of the adversary judicial process make a fair trial impossible

[7] *continued*
expense and efficiency cannot outweigh the right to procedural due process. *Fuentes v. Shevin*, 407 U.S. 67, 90-91 n.22 (1972). If it is "within the limits of practicability," due process requires the State to provide a meaningful opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (quoting *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 318 (1950)). *See also, Bell v. Burson*, 402 U.S. 535, 540 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

without the assistance of counsel. *See also, In re Gault*, 387 U.S. 1, 36 (1967); *Farretta v. California*, 422 U.S. 806, 832-833 (majority opinion) and 838 (Burger, C.J., dissenting) (1975); *Holloway v. Arkansas*, ... U.S. ....., 98 S.Ct. 1173, 1181 (1978); *Schneckloth v. Bustamonte*, 412 U.S. 218, 241-242 (1973). Moreover, as the Court found in *Argersinger*, 407 U.S. at 33-37, the necessity of counsel for a fair trial is as great in petty offense and misdemeanor trials as in felony trials. *Infra* p. 51. *See also, Sibron v. New York*, 392 U.S. 40, 52 (1968). This fact is fully illustrated by the trial in the instant case. *See infra* Part V. pp. 62-64.

As noted *supra* pp. 23-24, *In re Gault*, 387 U.S. 1 (1967), provides the clearest illustration of the subordination of the governmental cost factor in a due process analysis where the right to counsel is deemed essential to a fair fact-finding process. Two more recent decisions in which the Court found no due process right to counsel in quasi-judicial proceedings reveal no departure from *Gault's* emphasis on the necessity of counsel for fairness in judicial proceedings. In *Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1973), the Court did recognize that the cost of adding counsel for *both* the State and the probationer in probation revocation hearings would not be insubstantial. However, the Court's refusal to require the right to counsel in all revocation proceedings was based on its finding that given the nature and purpose of the hearing, the probationer can be given fair treatment, and possibly more favorable treatment, without counsel and the procedural formalization counsel entails.[8] Moreover,

[8] "In a revocation hearing, on the other hand [contrasted to the attributes of a criminal trial], the State is represented not by a prosecutor but by a parole officer with the orientation described above ["concern for the client dominates his professional attitude"]; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation and parole." 411 U.S. at 789.

despite the added cost, the Court required the State to provide counsel where, based upon the facts and circumstances of the individual case, "the probationer's or parolee's version of a disputed issue can fairly be represented only by a trained advocate." 411 U.S. at 788.

Unlike *Gagnon*, the Court in *Middendorf v. Henry*, 425 U.S. 25, 44 (1976), did consider the "extraordinarily weighty" governmental interests at stake to be the paramount factor in denying the due process right to counsel in summary courts-martial proceedings. Noting the "overriding demands of discipline and duty" of armed forces personnel, quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953), the Court found compelling the Congressional determination that the unique interests of the military in having brief, informal hearings without counsel outweighed the individual interests in having counsel.[9] *Id.* at 45. Nevertheless, the Court took care to point out that in a summary court-martial the non-adversary, adjudicatory hearing, unlike a criminal trial, could be administered fairly without counsel.[10] *Id.* at 40-42.

[9] *Middendorf* cannot be viewed as a true *Mathews v. Eldridge* type of due process, interest balancing case since the Court found it necessary to "give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. 1, § 8, that counsel should not be provided in summary courts-martial." 425 U.S. at 43.

[10] The summary court-martial proceeding described by the Court is more inquisitorial than adversary, the presiding officer being "enjoined to attend to the interests of the accused." 425 U.S. at 41. Furthermore, where the serviceman believes counsel important in order to present his case he can elect to proceed to trial by special or general court-martial where he has a right to counsel. *Id.* at 47. Whether the demands of military necessity would still have prevailed had the Court found that fair adjudication required the assistance of counsel is an interesting but irrelevant question in the context of the

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Thus, the Court has never tolerated the deprivation of protected liberty and property interests through fundamentally unfair trial procedures because of the cost of providing fair procedures. The fact that providing such counsel may be an expense to the government is therefore not a legally cognizable justification for the government's refusal to provide the defendant with a right to counsel. Even if analogy is made to the Court's administrative due process decisions, governmental cost becomes a factor in the context of an adversary proceedings only if it is of an extraordinary nature. The only governmental interest of extraordinary importance at stake in this case, however, is that of assuring that the right to counsel is provided in misdemeanor trials.

C.

The Government's Interest In Assuring The Right To Counsel In Misdemeanor Trials Outweighs The Possible Added Expense Of Providing Such Counsel.

1. Providing The Right To Counsel In Misdemeanor Trials Is In The Interest Of Society And, Therefore, Of Government.

The government has a paramount interest in assuring that criminal trials result in fair determinations of guilt or innocence. The Court declared in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), that: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." The Court's

[10] *continued*
instant case where there is neither a governmental interest to weigh in the balance that is remotely similar to the needs of the armed forces nor a separation-of-powers clause problem in applying the dictates of due process.

finding as to the necessity of the reasonable doubt standard in order to command the respect and confidence of the community in the criminal law, *In re Winship*, 397 U.S. 358, 364 (1970), is equally true with respect to the necessity of defense counsel. Both are essential to assure that "every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." *Id.* The Court recognized that to leave people in doubt whether innocent men are being condemned will dilute the moral force of the criminal law. *Id.*

Uncertainty as to the validity of the criminal trial process will also tend to cause anti-social responses on the part of those convicted in a trial that did not have the appearance of fairness. *Cf. Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring). The Court's observation in *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972), with respect to society's interest in treating the parolee with basic fairness is even more important with respect to the defendant convicted in a criminal trial; for both of them "fair treatment . . . will enhance the chances of rehabilitation by avoiding reactions to arbitrariness." (footnote omitted).

Procedural due process, the Court has recently noted, has an importance to organized society of an absolute nature that transcends the personal substantive claims of the individual parties. *Carey v. Piphus*, ..., U.S. ....., 98 S.Ct. 1042, 1054 (1978). Denial of the right to counsel to defendants not actually imprisoned after conviction for misdemeanors punishable by imprisonment will, perhaps, save the State money and will certainly make it easier for the State to win convictions, but those interests are in no respect commensurate with society's

overriding, absolute interest in assuring that its criminal prosecutions are procedurally fair.[11] *Cf. Berger v. U.S.*, 295 U.S. 78, 88 (1935).

2. Important Governmental Interests Will Suffer If The Right To Counsel Is Not Provided In All Misdemeanor Prosecutions Punishable By Imprisonment.

In addition to society's paramount interest in assuring a fair system of criminal justice, other substantial State interests will suffer if the right to counsel is not granted for all defendants charged with crimes punishable by imprisonment, regardless of whether they are in fact imprisoned. First, in order to deny the right to counsel to one charged with a crime punishable by imprisonment, the judge must decide in advance of the trial and sentencing hearing that he will not impose a prison sentence. It is, of course, proper for a judge to decide not to imprison a convicted defendant. However, Illinois, like most States, provides that the judge make this decision *after* the facts of the crime have been determined at trial and *after* a sentencing hearing has been held in order to elucidate the most appropriate sentencing alternative. *Ill. Rev. Stat.* Ch. 38, § 1005-4-1 (1977) and its predecessor, *Ill. Rev. Stat.* Ch. 38, § 8-7(9) (1971).

Dispensing with the trial and sentencing hearing in deciding the appropriate sentence defies not only legislative intent, but also accepted principles of rational judicial sentencing. In describing the role of the sentencing judge, the Court has stated: "Highly relevant—if

[11] Judge Friendly has pointed out that under the circumstances of a trial an inflexible rule requiring the right to counsel is appropriate since there is "everything to be gained by the presence of counsel and no interest deserving consideration to be lost. . . ." Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L.R. 929, 950 (1965) (quoted in *Schneckloth v. Bustamonte*, 412 U.S. 218, 242-243 n.30 (1973)).

not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Williams v. New York*, 337 U.S. 241, 247 (1949). (footnote omitted). To deprive the sentencing judge of the kind of information presented at the sentencing hearing, the Court observed:

> . . . would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination.

337 U.S. at 250. *A fortiori*, without even the information that has been adduced in court as to the nature of the defendant's criminal conduct, the judge's pre-trial predictive sentencing decision can only be uninformed guess-work that disserves the State's interest in rational, individualized sentencing. On the grounds that pre-trial predictive sentencing is both arbitrary and a usurpation of the legislative judgment that imprisonment is an appropriate alternative sentence for the type of crime charged, the Supreme Courts of Washington[12] and

[12] *McInturf v. Horton*, 85 Wash. 2d 704, 706, 538 P.2d 499, 500 (1975) "We reject the idea that a court can determine in advance of trial what the punishment will be. Such a procedure would violate every concept of due process. . . . The power to decide what acts shall be criminal, to define crimes, and to provide what the penalty shall be is legislative. . . . It would be wholly wrong for a court or a judge to determine in advance to abrogate a part of a statute or ordinance—either in a specific case or in a whole class of cases."

Wisconsin[13] have accorded the right to counsel for all defendants charged with crimes punishable by imprisonment. *See also, Argersinger v. Hamlin*, 407 U.S. 25, 53 (1972) (Powell, J., concurring in result). According to the one comprehensive study of the implementation of *Argersinger* by the lower courts, most of the judges interviewed believed "any sort of individualized-prediction hearing prior to trial was impractical and unwise." KRANTZ et al., RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF ARGERSINGER V. HAMLIN, 90 (1976) (hereinafter cited as KRANTZ).

Denying the right to counsel to misdemeanor defendants who are not imprisoned will not only make the sentencing determination uninformed, but will also render the sentences themselves of dubious effectiveness. Because it is unconstitutional under *Argersinger* to imprison a defendant as a result of an uncounseled conviction, presumably an indigent, and possibly any uncounseled defendant who cannot or does not pay his fine will be immune from imprisonment, as will be any uncounseled defendant who violates the terms of his probation, supervision or suspended sentence. For indigent uncounseled defendants fines will be meaningless; for all uncounseled defendants, probation and supervision will be hollow sanctions.[14] Cf. *Argersinger v. Hamlin*, 407 U.S.

[13] *State ex rel. Winnie v. Harris*, 75 Wis.2d 547, 556, 249 N.W.2d 791, 795-6 (1977) "Under this individualized prediction standard, the mere fact that the right to counsel has been gone into strongly indicates that the judge is already considering the possibility of jail for a particular defendant even though he has not heard the evidence. On the other hand, this system would also result in people not being incarcerated who should be because of an erroneous evaluation of sentence limitations prior to hearing the evidence in the case."

[14] An imprisonment-in-fact requirement for application of the right to counsel may even proscribe entirely sentences of probation, supervision, or conditional discharge for un-

(Footnote continued on following page)

at 55 (1972) (Powell, J., concurring in result); Krantz, *supra* at 33-44.

The State's interest in preserving the reliability of prior convictions for collateral use where they are important for informed decision-making will also be impaired by a rule depriving unimprisoned defendants of the right to counsel. Because uncounseled misdemeanor convictions are unconstitutional if they "end up in the actual deprivation of a person's liberty," *Argersinger*, 407 U.S. at 40, it would also be unconstitutional to use an uncounseled conviction in order to deprive a person of liberty in a subsequent proceeding.[15] Thus, uncounseled prior convictions could not be used to enhance punishment for subsequent offenses,[16] to revoke a suspended

[14] *continued*
counseled misdemeanor defendants. *Cf. LaBar v. Goodman*, 397 F.Supp. 463, 464 (W.D.N.C. 1975). The Court's holdings in *Jones v. Cunningham*, 371 U.S. 236 (1963), and *Hensley v. Municipal Court*, 411 U.S. 345 (1973), that parole restrictions and release on personal recognizance bond are sufficient deprivations of liberty to satisfy the custody requirement of the federal habeas corpus statute, 28 U.S.C. §§ 2241(c) and 2254(a), indicate that probation, supervision, and conditional discharge may likewise be held sufficiently serious deprivations of liberty to satisfy the imprisonment standard of *Argersinger*.

[15] *Marston v. Oliver*, 485 F.2d 705 (4th Cir. 1973); *Alexander v. State*, 527 S.W.2d 927 (Ark. 1975); *Morgan v. State*, 235 Ga. 632, 221 S.E.2d 47 (1975). Note, *Argersinger v. Hamlin And the Collateral Use of Prior Misdemeanor Convictions of Indigents Unrepresented by Counsel at Trial*, 35 Ohio St. L.J. 168, 179-184 (1974).

[16] *Thomas v. Savage*, 513 F.2d 536 (5th Cir. 1975); *State v. Reagan*, 103 Ariz. 287, 440 P.2d 907 (1968); *Morgan v. State*, 235 Ga. 632, 221 S.E.2d 47 (1975); *City of Monroe v. Fincher*, 305 So.2d 108 (La. 1974); *State v. Kirby*, 33 Ohio Misc. 48, 289 N.E.2d 406 (1972); *Maghe v. State*, 507 P.2d 950 (Okl. Crim. 1973) *but see People v. Baldasar*, 52 Ill. App.3d 305, 367 N.E.2d 459 (1977) cert. petition pending, No. 77-6219.

sentence,[17] to revoke parole or probation,[18] or to impeach the defendant.[19] Moreover, since the use of prior uncounseled convictions would be allowed by a prudent trial judge only in the least serious prosecutions in which there is no likelihood of imprisonment, the policy against affording the right to counsel in all misdemeanor prosecutions would have the illogical result of denying to the State the use of a defendant's record of past uncounseled convictions in the more serious prosecutions, where such record is most important to the State's law enforcement goals.

An additional problem for the State in supporting an imprisonment-in-fact limitation on the right to counsel in misdemeanor cases is that it would deny its non-indigent citizens the equal protection of the laws when they are charged with a crime for which they may be imprisoned, but for which indigents who are not appointed counsel may not be imprisoned. *Cf. Argersinger v. Hamlin*, 407 U.S. 25, 55 (1972) (Powell, J., concurring in result). Although the trial court's pre-trial decision to eliminate the possibility of imprisonment confers a relative benefit on the basis of a defendant's indigency, the equal protection clause has been held to require that maximum statutory penalties "for any substantive offense be the same for all defendants irrespective of their economic status." *Williams v. Illinois*, 399 U.S. 235, 244 (1970). Indeed, the Court in *Williams* stated

[17] *Alexander v. State*, 527 S.W.2d 927 (Ark. 1975).

[18] *State v. Harris*, 312 So. 2d, 643 (La. 1973); *Dugan v. Cardwell*, [1978] Pov. L. Rep. (C.C.H.) ¶ 26,330 (Ariz. Sup. Ct. June 21, 1978).

[19] *Potts v. Estelle*, 529 F.2d 450 (5th Cir. 1976); *Commonwealth v. Barrett*, 322 N.E.2d 89 (Mass. App. 1975); *Cf. Loper v. Beto*, 405 U.S. 473 (1972).

that it would constitute inverse discrimination to allow indigents to avoid both a fine and imprisonment for non-payment, whereas other defendants must suffer one or the other. 399 U.S. at 244. An identical type of inverse discrimination would occur under a pre-trial predictive sentencing process for indigent defendants since before trial all non-indigents would be subject to a fine and imprisonment, while selected indigents, identical to the non-indigents in every respect except their economic status, would be subject only to a fine. The only remedy for this equal protection violation would be to hold pre-trial predictive sentencing evaluations for all defendants, regardless of indigency, and then to apply to all of them the same criteria for eliminating the possibility of imprisonment.[20] However, this would constitute both an extreme judicial incursion into the integrity of the statutory sentencing scheme and a costly use of court time and manpower.

The equal protection problems for the State in this pre-trial sentencing process will be magnified when such wealth-related distinctions are made either on the basis of the different policies on appointment of counsel adopted by the various jurisdictions within a single State or on the basis of the individual judges' predilections as to either the seriousness of different classes of offenses or the need to have counsel for fair trials. When each judge applies his own personal unpublished standard for determining before trial what types of trials require counsel for fairness and what types of offenses deserve the legislatively authorized sanction of imprisonment, arbitrary and discriminatory differences in the determination of the rights and liabilities of identically situated defendants will be inevitable. *Cf. Argersinger v. Hamlin*, 407 U.S. 25, 54 (1972) (Powell J. concurring in result); KRANTZ, *supra* at 101-104.

[20] This, however, would not avoid the equal protection violation, discussed *infra* in Part III, pp. 47-50, that would arise from denying indigent misdemeanor defendants the right to appointed counsel at trial even if they are not imprisoned.

Each of the foregoing problems the State encounters when it requires a judge to choose before trial which defendants should or should not have the right to counsel may not by itself be of sufficient constitutional magnitude to invalidate the process for pre-trial selection of the defendants deserving counsel. However, when considered together as a factor in the due process interest belancing test, the collective detrimental effect of such problems clearly outweighs the modest cost-benefit that may accrue to the State from denying appointed counsel to some of the indigent misdemeanor defendants who are not imprisoned.

3. Providing The Right To Counsel In All Misdemeanor-Theft Prosecutions Will Not Result In Impracticable Costs.

The one interest the State, of course, can assert against affording the right to counsel to all defendants charged with misdemeanors punishable by imprisonment is that this may entail an additional expense for the State.[21] Two recent comprehensive studies of the

[21] In evaluating claims that such additional expense would be unbearable, it is instructive to note that despite the forecasts that the rule in *Argersinger* would overtax the resources of the courts, the one comprehensive study that has surveyed the question "uncovered no judges who claimed that *Argersinger* requirements imposed any extraordinary burdens on the courts." KRANTZ, *supra* at 433.

question of how costly it would be to afford counsel in such cases concluded that reliable statistics to support an accurate estimate of this cost do not exist, that "the question of calculating the cost of defense services remains largely an enigma." GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Final Report of the National Study Commission on Defense Services, 259 (1976); KRANTZ, *supra* at 10-18. Nevertheless, the conclusion that has been drawn by these two studies, as well as by several other nationally recognized commissions that have recommended standards for the criminal justice system, is that the right to appointed counsel for indigent defendants should be available in all misdemeanor cases punishable by imprisonment.[22]

In reaching this conclusion the National Conference of Commissioners on Uniform State Laws determined that the cost of providing counsel for indigent defendants charged with offenses punishable by incarceration would not be excessive. Uniform Rules of Criminal Procedure, Rule 321(b) Comment, p. 54 (1974). The Commissioners based this conclusion on two findings: first, that appointed counsel can represent twice as many non-felony as felony defendants and second, that despite the

[22] GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, 15; KRANTZ, *supra* at 104 (1976); National Conference of Commissioners on Uniform State Laws, UNIFORM RULES OF CRIMINAL PROCEDURE, Rule 321(b) (Approved Draft 1974); The National Advisory Commission on Criminal Justice Standards and Goals, COURTS, Standard 13.1 (1973). *See also*, President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 368. ("The objective to be met as quickly as possible is to provide counsel to every defendant who faces a significant penalty, if he cannot afford to provide counsel himself.")

considerably greater number of non-felony than felony defendants, only about one and one-half times as many non-felony as felony defendants require appointed counsel because only 10% of the former, as opposed to 60-65% of the latter, meet necessary indigency standards. *Id.*

The Commissioners also noted that legislatures adopting their rule would no doubt reclassify some minor offenses presently punishable by incarceration. *Id. See also* KRANTZ, *supra* at 502, 550. Although the Court recognized in *Argersinger* that classification of crimes is largely a state matter, if the State is indeed concerned that it cannot afford to provide counsel for indigent defendants in all of the minor offense prosecutions that now carry the potential for imprisonment, the State can, as noted in *Argersinger* and as recommended by the American Bar Association Special Committee on Crime Prevention and Control, remove such minor offenses from the court system altogether. 407 U.S. 25, 38 n.9 (1972). Because of the cost-saving potential of such decriminalization, the National Advisory Commission on Criminal Justice Standards and Goals, recommended that appointed counsel be available in *all* criminal cases. *Courts*, Standard 13.1 (1973). The Commission reasoned that if its recommendation to decriminalize most traffic offenses were followed, the non-jailable misdemeanors would constitute a very small category of cases. Therefore, because of the minimal incremental cost involved, the Commission found that it would be worthwhile in terms of fairness and the image of criminal justice in the lower courts to extend the right to counsel to such non-jailable offenses. *Id.* at 253-254.

Even if legislatures do not choose to decriminalize minor traffic violations, the increase in the number of

defendants who would require appointed counsel as a result of a ruling in favor of petitioner's right to counsel would be relatively slight if the ruling were to be limited to offenses as serious as petitioner's misdemeanor-theft conviction. The largest proportion of non-felony prosecutions are not for the more serious *malum in se* or common law crimes, such as theft, but rather, are for the minor regulatory-type offenses, such as traffic violations, public drunkenness or disorderly conduct. National Advisory Commission on Criminal Justice Standards and Goals, *Courts*, 168-169 (1973); KRANTZ, *supra* at 449, 595. Moreover, in the jurisdictions that do not presently extend the right to counsel to all prosecutions of misdemeanors punishable by imprisonment, it is likely that relatively few defendants charged with the more serious misdemeanors are now tried without counsel because the prosecutor and trial court will usually wish to keep open the option of imprisonment in such cases.

Conclusive evidence that it would not be an impractical or undue burden on the State to provide the right to counsel in all misdemeanor prosecutions punishable by imprisonment is that twenty-two States now do exactly that. *See* Appendix to Petitioner's Brief. No reports of resulting impracticality or undue burdensomeness have been forthcoming.[23] The Court has previously found the fact that States have voluntarily adopted a rule of procedure to be persuasive evidence that it would not cause undue hardship on the States if the Court should also find such rule constitutionally required. *Elkins v. U.S.*, 364 U.S. 206, 218-219 (1960); *Mapp v. Ohio*, 367 U.S. 643, 651 (1961). *Cf. Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

[23] A review of state legislation and court rules after *Argersinger* reveals a trend towards adopting a broad right to counsel rule either in all criminal cases or in all cases where imprisonment is authorized. Once adopted, no State appears to have abandoned such a rule.

Finally, in evaluating the net cost of providing a right to counsel in all misdemeanor cases, it is important not to discount the cost savings due to the more efficient and expeditious completion of cases that is possible when both sides are represented by experienced counsel. The Chief Justice has noted that a result of the lack of competent advocates has been "that it often takes far longer to complete a given case than experienced counsel would require . . ." and that it would almost certainly follow if self-representation were to become widespread "that there will be added congestion in the courts and that the quality of justice will suffer." *Farretta v. California*, 422 U.S. 806, 845 (1975) (Burger C.J., dissenting).

In sum, the weight to be accorded a governmental cost argument against finding a due process right to counsel in misdemeanor prosecutions that are punishable by imprisonment depends upon which of two alternative due process analyses the Court finds applicable. First, under the approach taken in *In re Gault*, 387 U.S. 1 (1967), the findings that counsel was essential for a fair trial and that the juvenile proceeding had a potential for confinement were sufficient in themselves to require the right to counsel without any balancing of governmental costs. Because both findings are equally, if not more strongly, applicable to misdemeanor prosecutions punishable by imprisonment, the right to counsel should also be afforded in such cases regardless of a governmental cost factor.

Alternatively, under the due process balancing test of the less analogous administrative procedure cases, *supra* pp. 24-25 only extraordinary governmental costs can be weighed against the need for procedural safe-

guards that are essential for fair fact-finding. Because there is no evidence that requiring counsel in misdemeanor prosecutions punishable by imprisonment would require governmental costs of an extraordinary nature, it is unnecessary to determine whether the individual and societal importance of fairness in misdemeanor trials should outweigh the problems attendant upon such extraordinary governmental costs. Thus, whichever due process test is adopted, the governmental cost of providing the right to counsel in misdemeanor cases affords no basis for denying that right.

D.

The Individual Interest At Stake In A Misdemeanor-Theft Prosecution Not Resulting In Imprisonment Is Substantial Enough To Require The Essential Elements Of A Fair Trial.

The only remaining argument against affording the right to counsel in prosecutions for misdemeanors punishable by imprisonment, but resulting in a fine and/or probation, is that the harm to the defendant is of a *de minimis* nature and, therefore, not deserving of due process protection. *Goss v. Lopez*, 419 U.S. 565, 576 (1975). This argument, however, cannot survive a moment's reflection as to the inevitable effect on an individual's self-respect when he is permanently classified by society as a criminal. The Court recognized the significance of the personal disgrace attendant upon a criminal conviction in a society that values the good name of every individual when it observed that an accused has an "immense interest" in a criminal prosecution, not only because he might lose his liberty, but also "because of the certainty that he would be stigmatized by the conviction." *In re Winship*, 397 U.S. 358, 363, 364 (1970).

In addition, the imposition of a fine will necessarily be a deprivation of substantial consequence to the indigent misdemeanor defendant, whose right to appointed counsel is by definition at stake in this case. Besides fines and imprisonment, other forms of misdemeanor sentences also inflict deprivations serious enough to warrant due process protection. Thus, a misdemeanor defendant in Illinois may undergo substantial restrictions on his liberty because of a sentence of "probation," Ill. Rev. Stat. Ch. 38, §§ 1005-1-18, 1005-6-2 (1977), "conditional discharge," Ill. Rev. Stat. Ch. 38, §§ 1005-1-4, 1005-6-2 (1977), or "supervision," Ill. Rev. Stat. Ch. 38 §§ 1005-1-21, 1005-6-3.1 (1977).[24] The Court has recognized the significance of such deprivations in finding federal habeas corpus jurisdiction where the habeas petitioner is on parole. "What matters," the Court stated, is that such restrictions "significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

Any attempt to portray the effects of a misdemeanor conviction without imprisonment as inconsequential also cannot withstand comparison with both similar and less serious criminal-type sanctions that the Court has deemed sufficiently grievous to justify imposition of substantial procedural safeguards. Most telling is a comparison with the fine-only, municipal ordinance violation that the Court in *Mayer v. City of Chicago*, 404 U.S. 189 (1971), found serious enough to justify requiring the City

[24] Furthermore, if a sentence of "time served" for an uncounseled misdemeanant who has been unable to afford bail does not violate *Argersinger's* prohibition against imprisonment as a result of an uncounseled conviction, such a sentence would substantially aggravate the stigma that otherwise follows from a misdemeanor conviction.

to provide a free appellate transcript estimated to cost $300.00. In answer to the City's argument that "where the accused . . . is not subject to imprisonment, but only a fine . . . his interest in a transcript is outweighed by the State's fiscal and other interests in not burdening the appellate process," the Court noted, *inter alia*, that the fine-only conviction may be equally or more severe to an indigent than imprisonment:

> The practical effects of conviction of even petty offenses of the kind involved here are not to be minimized. A fine may bear as heavily on an indigent defendant as forced confinement. The collateral consequences of conviction may be even more serious. . . .

404 U.S. at 197. The comparison of the instant case to *Mayer* is revealing because the interests of a defendant in having counsel at trial in order to avoid a theft conviction clearly outweigh the interests of a defendant in having a transcript to facilitate an appeal of an ordinance violation conviction. *See infra* pp. 48-50.

It is also instructive to compare the degree of deprivation from a misdemeanor conviction where the sentence is a fine and/or probation with the one day's confinement that the Court in *Argersinger* found sufficient to warrant the right to counsel. As noted by the Court in *Mayer*, 404 U.S. 189, 197, and by Mr. Justice Powell concurring in the result in *Argersinger*, 407 U.S. at 48, the many collateral consequences of a conviction, such as the stigma, various job disqualifications and license revocations, may be more severe than a brief stay in jail, as also may be a substantial fine for an impecunious individual.[25] The Court has given further recognition to

[25] The seriousness of the collateral consequences of criminal convictions has been noted by numerous legal commentators. Special Project, *The Collateral Consequences of a Criminal*

(Footnote continued on following page)

the seriousness of the collateral consequences of convictions in its many decisions that have refused to dismiss for mootness direct appeals of and collateral attacks upon convictions where the appellant is not in custody.

[25] *continued*

Conviction, 23 Vand. L. Rev. 929 (1970); Cohen, *Civil Disabilities: The Forgotten Punishment*, 35 Fed. Prob. 19 (June, 1971); Rubin, *Man With a Record: A Civil Rights Problem*, 35 Fed. Prob. 3 (Sept. 1971); President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: Corrections (1967). The serious adverse collateral consequences resulting from criminal convictions have also been verified through empirical research. *Cf.* J. Reed and R. Reed, *Status, Images and Consequence: Once A Criminal Always A Criminal*, 57 Sociology and Social Research 460 (1973); Schwartz and Skolnick, *Two Studies of Legal Stigma*, 10 Social Problems 133 (1962); Melichercik, *Employment Problems of Former Offenders*, 2 National Probation and Parole Assoc. Journal 43 (1956). The particular effects on petitioner of his misdemeanor conviction should he choose to remain in Illinois are many. Because a theft conviction indicates dishonesty it may be used for impeachment should petitioner become a witness in court. *People v. Stufflebean*, 24 Ill. App. 3d 1065, 1068-1069, 322 N.E.2d 488, 491-492 (1974). Because jurors must be of "fair character" and "approved integrity," Ill. Rev. Stat. Ch. 78 § 2 (1977), he may be excluded from jury duty as a result of his theft conviction. A subsequent conviction for theft would subject him to the enhanced felony penalty of imprisonment in the penitentiary from one to three years. Ill. Rev. Stat. Ch. 38 §§ 16-1(e)(1), 1005-8-1(7) (1977). *See People v. Baldasar*, 52 Ill. App.3d 305, 367 N.E.2d 459 (1977) cert. petition pending No. 77-6219. Twelve occupations licensed under Illinois law and twenty-three occupations licensed under City of Chicago ordinance require the license applicant to have "good moral character" or some equivalent background qualification that could be found unsatisfied because of a theft conviction. *See* Chicago Council of Lawyers, *Study of Licensing Restrictions on Ex-Offenders in the City of Chicago and the State of Illinois*, 8, A-17 (1975). Under federal law petitioner's theft conviction would also bar him from working in any capacity in a bank insured by the F.D.I.C., 12 U.S.C. § 1829 (1950), or possibly in any public or private employment requiring a security clearance. 32 CFR § 155.5(h) and (i), and § 156.7(b)(1)(iii).

Sibron v. New York, 392 U.S. 40, 54-57 (1968); *Carafas v. LaValee*, 391 U.S. 234, 237-238 (1968); *Benton v. Maryland*, 395 U.S. 784, 790 (1969); *Street v. New York*, 394 U.S. 576, 579-580, n.3 (1969); *Ginsberg v. New York*, 390 U.S. 629-633, n.2 (1968).

Finally, any argument that convictions for misdemeanors punishable by up to a year's imprisonment are not sufficiently serious deprivations to warrant the due process right to counsel where the defendant is not in fact imprisoned is inconsistent with the holding of *Baldwin v. New York*, 399 U.S. 66 (1970), that the Sixth Amendment right to a jury trial applies to all offenses punishable by more than six months imprisonment, whether or not the defendant is in fact imprisoned. Because denial of the right to counsel, and not denial of the right to jury trial, "substantially impairs . . . [the criminal trial's] truth-finding function and so raises serious questions about the accuracy of guilty verdicts," *Williams v. United States*, 401 U.S. 646, 653 (1971), it would be anomalous to hold that under due process of law the protection afforded by a jury trial is available in less serious cases than the more critical protection afforded by counsel.

Thus, the adverse effects of a misdemeanor-theft conviction in which a fine and/or probation is imposed are far from *de minimis*. The fine inevitably deprives an indigent of an important property interest and probation deprives any person of substantial liberty interests. The conviction itself forecloses a wide variety of job opportunities across the nation. The permanent stigma of being classified as a criminal diminishes both the individual's standing in the community and his own sense of personal integrity. Therefore, there is no justification for the argument that under the standards of due

process petitioner's deprivation was too minor for the State to be required to afford him the most essential element of a fair trial — the assistance of counsel.

III.

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THAT INDIGENT DEFENDANTS CHARGED WITH MISDEMEANORS PUNISHABLE BY IMPRISONMENT HAVE THE RIGHT TO APPOINTED COUNSEL AT TRIAL REGARDLESS OF WHETHER OR NOT THEY ARE IMPRISONED.

In *Douglas v. California*, 372 U.S. 353 (1963), the Court held that denial of appointed counsel in an indigent defendant's initial appeal of right violates the Equal Protection Clause of the Fourteenth Amendment. There is no principled answer to Mr. Justice Harlan's observation in his dissent that the Court's equal protection rationale applies as well to an indigent defendant's right to counsel at trial. 372 U.S. at 363. *Cf.* Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 Sup. Ct. Rev. 211, 248. Recent Court decisions have made even more clear that the equal protection right to appointed counsel on appeal must logically extend to the right to appointed counsel at trial.

First, whether at trial or on appeal, the basis for the disparate treatment, the defendant's inability to afford counsel, is the same. It is as unconstitutional now as it was in *Griffin v. Illinois*, 351 U.S. 12, 19 (1956), to make "the kind of trial a man gets depend on the amount of money he has." *See Mayer v. City of Chicago*, 404 U.S. 189, 193 (1971). Second, the consequences of an erroneous misdemeanor conviction, even where the penalty is only a fine, are at least as severe as the consequences of the fine-only municipal ordinance violation, which the

Court found sufficiently serious to warrant the guarantee of equal protection in *Mayer v. City of Chicago*, 404 U.S. at 197. ("The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed.")

Third and most important, the nature of the disparate treatment, denial of counsel on the basis of wealth, has more serious consequences for the indigent defendant at the trial level than at the appellate level. As the Court has often noted, not every difference in the abilities of rich and poor to present their defenses is proscribed by equal protection; rather, it is required only "that indigents have an adequate opportunity to present their claims fairly within the adversary system." *Ross v. Moffitt*, 417 U.S. 600, 612 (1974) (citing *Griffin v. Illinois*, 351 U.S. 12 (1956) and *Draper v. Washington*, 372 U.S. 487 (1963)). If the assistance of counsel were less important for an adequate defense at trial than on appeal, a basis for distinguishing *Douglas* could be argued. However, because the exact contrary is true, the equal protection rationale of *Douglas* applies more forcefully to the instant case than to *Douglas* itself.

More is at stake for the defendant, and his need for counsel greater, when he is fighting to maintain his innocence during trial than when he is attempting to overturn in a higher court a conviction based on an established trial record. In *Ross v. Moffitt*, 417 U.S. at 610, 611, the Court pointed out the significant differences between the trial and appellate stages of a criminal proceeding that make it crucial to have a lawyer at the trial stage, but not necessarily at the appellate stage. With respect to the need for counsel at trial, the Court stated:

> The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. To accomplish this purpose, the State employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant, argues rulings of the court, and makes direct arguments to the court and jury seeking to persuade them of the defendant's guilt. Under these circumstances reason and reflection require us to recognize that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." [quoting *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)]

Ross, 417 U.S. at 610. At the appellate stage, however, the Court found counsel not as critical:

> The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the state may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all.

417 U.S. at 610-611.

The distinction made by *Ross* in the importance of counsel at the trial and appellate stages is demonstrated by the example of the instant case. Counsel for Scott at trial could have cross-examined the adverse witness, could have compelled the presence of witnesses, could have moved for a directed verdict in order to challenge the insufficiency of the State's proof, could have either exercised the defendant's Fifth Amendment privilege against self-incrimination or presented a coherent

direct examination, and could have made a closing argument capitalizing on the judge's own professions of doubt about the sufficiency of the State's case. On appeal, these most basic functions of defense counsel are meaningless. The factual record as presented by the examination of the prosecutor, as supplemented by the questioning of the judge and as confused by the testimony of the defendant gives appellate counsel little of substance to argue. Once the adversary system has broken down at trial, it cannot be resurrected on appeal. In sum, if the Equal Protection Clause requires that "indigents have an adequate opportunity to present their claims fairly within the adversary system," *Ross supra*, it makes no sense to require appointment of counsel for indigents on appeal, but not for indigents at trial.[26]

IV.

THE DUE PROCESS SAFEGUARDS NECESSARY TO PREVENT AN INACCURATE AND PREJUDICIAL PRE-TRIAL DEPRIVATION OF A MISDEMEANOR DEFENDANT'S RIGHT TO COUNSEL WOULD REQUIRE EXPENDITURE OF CONSIDERABLE JUDICIAL RESOURCES. THESE RESOURCES COULD BE SAVED BY AFFORDING THE RIGHT IN ALL MISDEMEANOR PROSECUTIONS.

A.

The Fundamental Nature Of A Misdemeanor Defendant's Interest In Having The Assistance Of Counsel At Trial Warrants Due Process Protection Regardless Of Whether Or Not The Defendant Is Imprisoned.

Assuming *arguendo* that there is no absolute constitutional right to counsel in the trial of all mis-

[26] *See also Miranda v. Arizona*, 384 U.S. 436, 472-473 (1966) ("Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and appeal struck down in *Gideon v. Wainwright*, and *Douglas v. California*.")

demeanors punishable by imprisonment, a trial court must make a pretrial determination of the right to counsel in each case. The right must be accorded if the judge predicts either that imprisonment will be likely upon conviction or that the special circumstances of the case will require counsel for a fair trial. *See Argersinger v. Hamlin*, 407 U.S. 25, 63-68 (Powell, J., concurring in result); *Bute v. Illinois*, 333 U.S. 640, 677 (1948); *Gagnon v. Scarpelli*, 411 U.S. 778, 791 (1973).

A defendant's interest in assuring that this predictive determination does not unfairly deny him the right to counsel is of a nature deserving due process protection. The actual deprivation at stake in this determination is not only the denial of counsel's assistance, but also the increased likelihood of conviction that results when counsel is denied under circumstances where a fair trial depends upon counsel's assistance.

That lack of counsel substantially increases the likelihood of conviction is evident to anyone familiar with the practicalities of the adversary criminal trial process. The inherent complexities of a criminal trial guarantee that "in all but an extraordinarily small number of cases an accused will lose whatever defense he may have if he undertakes to conduct the trial himself." *Farretta v. California*, 422 U.S. 806, 838 (1975) (Burger, C.J., dissenting.) *See also* cases cited *supra* pp. 26-27. The denial of counsel prejudices the cases of misdemeanor defendants no less than felony defendants. In emphasizing the prejudice to misdemeanor defendants from "assembly-line justice," the Court in *Argersinger* cited the conclusion of one study that "misdemenants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel." 407 U.S. at 36.

The fact that a defendant denied counsel may have been convicted even if counsel had been appointed does not mitigate the prejudice from the denial of counsel. The Court has found that a wrongful denial of counsel cannot be deemed harmless since any attempt to ascertain what counsel would have done to avoid conviction would be "unguided speculation". *Holloway v. Arkansas*, ... U.S. ....., 98 S.Ct. 1173, 1182 (1978). Hence "prejudice is presumed regardless of whether it was independently shown." *Id.* at 1181.

The defendant who is denied the right to counsel does gain a relative benefit in not being directly subject to imprisonment. However, this assurance cannot be presumed to offset the prejudice from being placed in substantially greater jeopardy of conviction. As the Court found in *Mayer v. City of Chicago*, 404 U.S. 189, 197 (1971), and as Mr. Justice Powell observed, concurring in the result in *Argersinger*, 407 U.S. at 48, the collateral consequences of a conviction may be far more serious to an individual than a brief stay in jail.

Moreover, where the State's case is highly vulnerable to attack through the exercise of certain basic lawyering skills, such as conducting effective cross-examination, raising timely evidentiary objections, making affirmative legal defenses, motions for directed verdict or closing arguments, the determination of the defendant's right to counsel would virtually determine whether he is acquitted or convicted. In this common situation a state-imposed trade-off between a highly probable acquittal with counsel and immunity from prison without would not be fair to the defendant. Furthermore, since the prosecutor in this type of case has a strong interest in not having the opposition of skilled defense counsel, the unfairness of the trade-off is

compounded by the fact that the prosecutor will have the most influence on the judge's determination of whether defense counsel is necessary. For all of the foregoing reasons, a misdemeanor defendant's interest in the determination of whether or not he has a right to counsel, a determination that will often be the difference between conviction and acquittal, deserves due process protection.

B.

THE DETERMINATION OF THE NEED FOR COUNSEL IN A MISDEMEANOR TRIAL REQUIRES DUE PROCESS SAFEGUARDS IN ORDER TO MINIMIZE THE SUBSTANTIAL RISK OF ERROR AND PREJUDICE AGAINST THE DEFENDANT.

In addition to jeopardizing an important interest of the defendant, the pre-trial determination of the necessity of counsel in each defendant's misdemeanor trial is subject to substantial risk of error and, therefore, requires the safeguards of due process. *Carey v. Piphus*, ... U.S. ....., 98 S.Ct. 1042, 1050 (1978). The trial court in making such an individualized determination of the necessity of counsel would have to address two questions: first, pursuant to the holding of *Argersinger*, whether defendant is likely to be imprisoned if convicted, and second, whether under the special circumstances of the case, the assistance of counsel is required by due process in order to assure a fair trial. An affirmative answer to either question would then require appointment of counsel for an indigent desirous of counsel.

In order to determine whether an individual needs the assistance of counsel for a fair adjudication of guilt or innocence, the Court in *Gagnon v. Scarpelli*, 411 U.S. 778, 790, 791 (1973), and in the line of cases that applied

the "special circumstances" rule of *Betts v. Brady*, 316 U.S. 455 (1942), stressed the importance of two criteria: first, whether the case is complex and the defense difficult to present, and second, whether the defendant is capable of effectively presenting his defense. *Cf.* Israel, *Gideon v. Wainwright: The Art of Overruling*, 1963 Sup. Ct. Rev. 211, 251-252. In addition to the complexity of the case and the competency of the individual defendant, Mr. Justice Powell pointed out, concurring in the result in *Argersinger*, that the trial court should also consider in determining the need for counsel in a misdemeanor case the seriousness of the probable sentence upon conviction and the community's attitude toward either the defendant or the incident in question, 407 U.S. at 64. Mr. Justice Powell also noted that "there might be other reasons why a defendant would have a peculiar need for a lawyer which would compel the appointment of counsel in a case where the court would normally think this unnecessary." *Id.* It is inconceivable that a judge could arrive at an accurate and fair weighing of all of these intricate factors without first observing certain elementary principles of procedural due process, such as affording both sides an opportunity to be heard. *See infra* Part IV-C, pp. 56-59, for discussion of applicable due process safeguards.

Applying due process standards to the determination of the necessity of counsel in misdemeanor cases is necessary not only to assure an accurate assessment of the defendant's need for counsel, but also to protect the defendant from the serious potential for prejudice that inheres in the process of making pre-trial determinations as to the nature of the case, the character of the defendant or the likelihood of his imprisonment. The potential for prejudice under these circumstances is present whether or not the trial court ultimately decides to

appoint counsel and may be even greater when the court does make an appointment. As the Wisconsin Supreme Court has observed: "Under this individualized prediction standard, the mere fact that the right to counsel has been gone into strongly indicates that the judge is already considering the possibility of jail for a particular defendant even though he has not heard the evidence." *State ex rel. Winnie v. Harris*, 75 Wis. 2d 547, 556, 249 N.W. 2d 791, 795-6 (1977).

Whenever the judge sitting as trier of fact learns before trial of such pre-sentencing information as the prior arrest and conviction record of the accused or aggravating circumstances surrounding the alleged crime, "the possibilities of prejudice are obvious." Commentary to Standard 4.2, American Bar Assoc. Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures 208-9 (1967). *See also Argersinger v. Hamlin*, 407 U.S. 25, 42, (Burger, C.J., concurring) and 54 (Powell J., concurring in result); H. Kalven, Jr. and H. Zeisel, THE AMERICAN JURY. 124 (1966); National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure Rule 321(b), Comment at 53 (Approved Draft, 1974); Illinois Rev. Stat. Ch. 38, § 1005-3-4 (1977). Even in a jury trial, the disclosure of such presentencing information to the judge before trial may be prejudicial. The Court has noted that such pre-trial disclosure to a judge presiding over a jury trial would be of sufficient prejudice to contravene the purpose of Federal Rule of Criminal Procedure 32(c)(i). which prohibits a judge from considering pre-sentence reports before a finding or plea of guilt. *Gregg v. United States*, 394 U.S. 489, 492 (1969).

The need for an on-the-record hearing in which the defendant has notice and an opportunity to answer any

accusations the prosecutor makes against him is particularly important where the information the prosecutor is giving the court prior to trial is of a presentencing nature. The potential for prejudice is enormous when judge and prosecutor engaged in a private, pre-trial, off-the-record communication about the character of the defendant and the nature of his supposed criminal activities. Such *ex parte* communications are inconsistent with the fundamental principles of our adversary system of justice, and, as such, have been condemned by court and bar association alike. American Bar Association, Canons of Judicial Ethics, Canon 17 (1967); American Bar Association, Standards Relating to the Prosecution Function and the Defense Function, Section 2.8 (Approved Draft 1971); American Bar Association, Code of Professional Responsibility, EC 7-36, (1969); *Haller v. Robbins*, 409 F. 2d 857 (1st. Cir. 1969); *United States v. Solomon*, 422 F. 2d 1110 (7th Cir. 1970).

C.

THE PROCEDURAL SAFEGUARDS REQUIRED FOR A PRE-TRIAL DETERMINATION OF THE NECESSITY OF DEFENSE COUNSEL IN A MISDEMEANOR TRIAL INCLUDE AN ADVERSARY ON-THE-RECORD HEARING THAT RESULTS IN WRITTEN FINDINGS AND REASONS MADE BY A JUDGE OTHER THAN THE ONE WHO PRESIDES OVER THE DEFENDANT'S TRIAL.

Several procedural safeguards are therefore necessary both to assure an accurate case-by-case determination of the necessity of defense counsel and to eliminate the prejudice otherwise likely to result from pre-trial judicial consideration of the defendant's capacity or the likelihood of defendant's imprisonment. First, and perhaps most important, is the requirement that the

judge make on-the-record findings as to his reasons for refusing to appoint counsel. This will assure that the judge consider the factors determinative of the necessity for counsel and arrives at a rational assessment of those factors in a manner capable of review by a higher court. *Cf. Boykin v. Alabama*, 395 U.S. 238, 244 (1969). The Court has held that due process requires trial courts to make findings and give reasons in analogous contexts where the defendant's rights depend upon the court's giving due considerations to certain interests of the defendant. *Kent v. United States*, 383 U.S. 541, 561-2 (1965) (waiver of juvenile court jurisdiction); *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969) (imposition of heavier sentence after retrial). *See also Commonwealth v. Riggins*, 474 Pa. 115, 377 A.2d 140 (1977), and cases and articles cited therein. Additionally, in the quasi-judicial setting of a parole revocation hearing, the Court has required that the hearing officer's determination of the probationer's right to counsel be supported by a statement of reasons evidencing due consideration of the same types of factors on which the right to counsel at trial should depend. *Gagnon v. Scarpelli*, 411 U.S. 778, 791 (1973).

Second, it is critical that the information which the judge considers in making his determination of the necessity of counsel be presented in an on-the-record proceeding at which defendant is present so that *ex parte* communications between prosecutor and judge about the defendant can be eliminated and the effect on the trial court of any prejudicial information about the defendant can be determined on appeal. *Cf. Garner v. Louisiana*, 368 U.S. 157, 173 (1961).

Third, the defendant should be given an opportunity to object to the introduction of erroneous evidence concerning his background, *Townsend v. Burke*, 334 U.S.

736, 740-741 (1948), and to argue in his own behalf that he needs counsel because of the complexity of his defense or his ignorance of the requisites of trial practice.[27] By not notifying the defendant that the court is in the process of deciding his right to counsel and then by failing to allow the defendant to argue why he should not be denied that right the court would deny the most basic element of due process of law, the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

Finally, if the judge in determining the necessity of counsel should learn of defendant's prior record or of any non-admissible information concerning defendant's allegedly criminal activities, the trial should be held before a different judge.[28] Although judges, more than laymen, can be presumed not to rule on the basis of inadmissible information that they happen to hear in the

[27] This poses the same paradox that is inherent in the *Betts v. Brady* special circumstance rule in that the defendants who by virtue of their ignorance need the assistance of counsel the most, will by virtue of that same ignorance be least able to demonstrate such need. *Cf.* Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 Sup. Ct. Rev. 211, 263 n.301; *Pate v. Robinson*, 383 U.S. 375, 384 (1966) ("But it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial.") In order to avoid the unfairness inherent in requiring a layman to demonstrate why he is incapable of fairly representing himself, counsel will often be required at the pre-trial determination in order to explore with the defendant and to explain to the court the need for counsel at trial.

[28] This however, would not solve the problem of what has been called "derivative bias" in that the trial judge would know when counsel has been appointed that his fellow judge found something sufficiently bad about defendant to believe imprisonment would be the likely sentence. KRANTZ, *supra* at 89-90 (1976); National Conference of Commissioners on Uniform State Laws, UNIFORM RULES OF CRIMINAL PROCEDURE Rule 321(b), Comment at 53. (Approved Draft, 1974).

course of a trial, the necessity of making a pre-trial prediction as to the likelihood of defendant's imprisonment would institutionalize the introduction before the court of negative information about the defendant. In order to avoid having to put each trial judge's impartiality to this difficult test, always to the jeopardy of the defendant, the judge who tries the case should not be the one who has decided the defendant is likely to be imprisoned if convicted. *Cf. In re Murchison*, 349 U.S. 133, 138-139 (1955).

Given the foregoing due process safeguards required in order to make the pre-trial determination of the necessity of counsel in a misdemeanor trial both accurate and non-prejudicial, the cost of affording the right to counsel to all misdemeanor defendants may not be significantly less than the cost of making such case by case determinations of the necessity of counsel. Nevertheless, if not all defendants charged with misdemeanors punishable by imprisonment have a Sixth Amendment, due process or equal protection right to counsel, each such defendant at least has a due process right both to a fair on-the-record hearing on the question of whether the assistance of counsel is required in his case and to a statement of reasons should the judge find counsel not required. The record of the trial below reveals that not only did the judge not afford the defendant a hearing, but he gave no consideration to the defendant's individual need for counsel. Such disregard of the most minimal standards of due process is an independent ground for reversal of Scott's conviction.

V.

PETITIONER'S TRIAL WAS UNFAIR AND THEREFORE DENIED HIM DUE PROCESS OF LAW.

An unfair trial violates due process of law regardless of the severity of the penalty imposed. *Carey v. Piphus*, ... U.S. ....., 98 S.Ct. 1042, 1053-1054 (1978); *Argersinger v. Hamlin*, 407 U.S. 25, 62 (1972) (Powell, J., concurring in result). If the Court should find the right to counsel not constitutionally required in all misdemeanor trials, the pervasive unfairness in the conduct of petitioner's trial would still require reversal. However, a reversal solely because the trial itself proved unfair, rather than because the right to counsel was denied, would be inappropriate for several reasons. First, it would be inconsistent with the finding in *Argersinger* that counsel is as essential to a fair trial in misdemeanor cases as it is in felony cases. 407 U.S. at 32-34. It follows from this equation of defendants' need for representation in felony and misdemeanor trials that the *per se* guarantee of the right to counsel which *Gideon v. Wainwright*, 372 U.S. 335 (1963), held was necessary for a fair trial in felony cases is also necessary in misdemeanor cases.

Second, a rule which requires analysis of the circumstances of each trial in order to determine whether unfairness resulted from the absence of counsel would contradict the premise of the Court's holdings in *Holloway v. Arkansas*, ... U.S. ....., 98 S.Ct. 1173, 1181, 1182 (1978), that a denial of counsel must always be presumed to be prejudicial because of the impossibility of knowing what competent counsel might have accomplished in attempting to avoid conviction. Even if prejudice were not automatically presumed, the progression of pre-*Gideon* Court decisions applying the special

circumstances rule of *Betts v. Brady*, 316 U.S. 455 (1942), reveals that in practically every case where counsel is denied, fundamental unfairness is evident because competent counsel can always be expected to make a significantly better showing than a layman. *Cf. Carnley v. Cochran*, 369 U.S. 506 (1962); *Chewning v. Cunningham*, 368 U.S. 443, 447 (1962); Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 Mich. L.R. 219, 280 (1962).

Finally, implementation of a rule requiring case-by-case determinations of unfairness would encounter the same difficulties experienced under the *Betts v. Brady* special circumstances rule, which court and commentator alike have condemned as unworkable and disruptive to the judicial process.[29] Moreover, it is almost certain that a special circumstances rule would be even

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[29] The criticisms of the special circumstances rule have focused on the following shortcomings: (1) trial judges are unable to predict whether or not events in the forthcoming trial will create a need for counsel, *Cf.* Brief for the State Governments *Amici Curiae*, pp. 17-18, filed by the Attorneys General of twenty-three states in *Gideon v. Wainwright*, 372 U.S. 335 (1963); (2) the vagueness of the standard results in uncertain, uneven and often grudging application of the rule by trial and appellate courts, *Gideon v. Wainwright*, 372 U.S. 335, 351 (1963) (Harlan J. concurring); *Carnley v. Cochran*, 369 U.S. 506, 518-519 (1962) (Black, J. concurring); Israel, *Gideon v. Wainwright, The "Art" of Overruling*, 1963 Sup. Ct. Rev. 211, 264; (3) it requires extensive examinations of state law by the Supreme Court in order to determine whether errors on unconsidered issues revealed a need for counsel, *The Supreme Court, 1961 Term*, 76 Harv. L.R. 54, 116 (1962); (4) the burden of showing fundamental unfairness in the trial is placed only upon those who cannot afford to hire counsel, *McNeal v. Culver*, 365 U.S. 109, 118-119 (1961) (Douglas, J., concurring) and (5) by virtue of its breadth and vagueness, the special circumstances rule increases the Court's caseload by stimulating direct and collateral attacks on convictions. *The Supreme Court, 1948 Term*, 63 Harv. L.R. 119, 136 (1949).

less effective in assuring misdemeanor defendants a fair trial than it was in protecting the fair trial rights of felony defendants. The "low visibility" and the "rush-rush" assembly-line nature of many misdemeanor courts, *Sibron v. New York*, 392 U.S. 40, 52 (1968), *Argersinger v. Hamlin*, 407 U.S. 25, 34, 35 (1972), will often prevent each misdemeanor defendant's particular need for counsel from being given the careful scrutiny required by the special circumstances rule.

Nevertheless, should the Court find it necessary to examine the record below in order to determine whether petitioner's trial met the standards of due process, it is evident that unfairness pervaded the trial and that under several of the criteria established by the post-*Betts* decisions implementing the special circumstances test, the conviction must be reversed. Most significant in this regard, after the State had rested its case, defense counsel would undoubtedly have moved for a directed verdict on the grounds that there was no evidence that Scott had not paid for the items he allegedly stole.[30] By testifying Scott not only waived his directed verdict motion, *People v. Washington*, 23 Ill.2d 582, 179 N.E.2d 635 (1962), but he also tended to incriminate himself by volunteering that he was trying to find the sales girl in order to purchase the items when he was stopped in the store by the security guard. (A. 10) It is doubtful that Scott knew that he did not have to testify because the Judge did not advise him of his Fifth Amendment privilege against self-incrimination. Instead, the Judge asked him what he wished to say after the State rested its case. (A. 8)

[30] The complaining witness testified that he was outside the store for a few minutes before Scott walked out with the allegedly stolen item that Scott said belonged to him. (A. 8)

The second ground of unfairness was the lack of any cross-examination of the one witness against Scott. The Court has often identified ineffective cross-examination as an element of fundamental unfairness under the special circumstances test. *Carnley v. Cochran*, 369 U.S. 506, 512 (1962); *McNeal v. Culver*, 365 U.S. 109, 113-114 (1961). *A fortiori*, the lack of any cross-examination must evidence even greater unfairness.

Third, a coherent direct examination to elicit Scott's testimony might well have eliminated the Judge's confusion as to the sequence of events inside the store. Scott's testimony exemplifies the problem described in *Ferguson v. Georgia*, 365 U.S. 570, 593 (1961), faced by any defendant who must make a statement without the guidance of counsel: "he has been set adrift in an uncharted sea with nothing to guide him, with the result that his statement in most cases either does him no good or is positively hurtful." (quoting 7 Ga. B.J. 432, 433 (1945)).

Fourth, the Judge gave Scott no opportunity to make a closing argument, but rather, pronounced his guilt immediately after Scott's last response to the judge's questioning. The right of a *pro se* defendant to make a closing argument was deemed fundamental by the Court in *Herring v. New York*, 422 U.S. 853 (1975).

Finally, the Judge's conduct towards the defendant was an essential element of the trial's unfairness. The Judge did not notify Scott of any of the fundamental constitutional rights that have been deemed essential to a fair trial, including the right to be informed of the elements of the offense charged, the right to cross-examine witnesses, the right to call and compel witnesses in his own behalf, and the privilege against self-incrimination. Scott exercised none of these rights.

Moreover, after the State had rested its case, having foregone cross-examination and rebuttal, the Judge not only failed to advise Scott that he too could rest, but instead, asked Scott more questions to clear up the Judge's admitted doubts about the sufficiency of the State's case.[31] The conduct of the Judge in Scott's trial was far below the standard the Court has required of trial judges with respect to their duty to protect the rights of *pro se* defendants. *Cf. Carnley v. Cochran*, 369 U.S. 506, 510-511 (1962); *McNeal v. Culver*, 365 U.S. 109, 114 (1961).

The pervasive unfairness of Scott's misdemeanor trial was not the result of an unusually incompetent defendant, an unusually complicated factual or legal case, or an unusual trial judge. It was the usual result of a criminal trial in which only the State is represented by counsel. Although the foregoing examples of unfairness in Scott's trial demonstrate why this particular conviction should be reversed, more importantly, they demonstrate why it is necessary to require the right to counsel "in all criminal prosecutions."

[31] "The Court: There's a lot of questions I want to know." (A. 9)

CONCLUSION

For the foregoing reasons the petitioner respectfully requests that the judgment and opinion of the Supreme Court of Illinois, which affirmed the decision of the Appellate Court of Illinois, First District, which affirmed the conviction of petitioner by the Circuit Court of Cook County, Illinois, be reversed.

Respectfully submitted,

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APPENDIX TO BRIEF FOR PETITIONER

State*	Offenses To Which The Right To Counsel Applies	Statute Or Rule	State Court Decision	Legislative History
Alaska	Any offense which may result in imprisonment, loss of valuable license, or a heavy fine.	Alaska Stat. §18.85.100 (Supp. 1973) Alaska Const., Art. 1 §11.	*Alexander v. City of Anchorage*, 490 P. 2d 910 (Alaska, 1971).	
Arizona	In any criminal proceeding which may result in punishment by loss of liberty and in any other criminal proceeding in which the court concludes that the interests of justice so require.	17 A.R.S. Rules of Crim. Proc. 6.1(b) (1975).		Pre-*Argersinger* rule required a mandatory appointment if potential penalty 6 months imprisonment or $500 fine or both. *Barrage v. Superior Court*, 105 Ariz. 53, 459 P. 2d 313 (1969).
California	In every criminal case including misdemeanors.	Cal. Penal Code §§858, 859, 987 Cal. Const. Art. 1 §15 (1975).	*People v. Williams*, 90 Cal. Rptr. 292 (1970); *In re Lopez*, 84 Cal. Rptr. 361, 465 P. 2d 257 (1970); *In re Render*, 76 Cal. Rptr. 522 (1969); *In re Johnson*, 42 Cal. Rptr. 228, 398 P. 2d 420 (1965).	

* Alabama, Florida, Georgia and Mississippi are not listed, although they are subject to the rule of the Fifth Circuit Court of Appeals that the Sixth Amendment right to counsel applies in all cases in which imprisonment is an authorized sentence. *See Potts v. Estelle*, 529 F.2d 450 (5th Cir. 1976); *Thomas v. Savage*, 513 F.2d 536 (5th Cir. 1975).

State	Offenses To Which The Right To Counsel Applies	Statute Or Rule	State Court Decision	Legislative History
Connecticut	In any criminal action.	Conn. Gen. Stat. §51-296 (1975).		Pre-*Argersinger* rule adopted federal standards. §51-297(f) defines an indigent defendant as a person who is formally charged with the commission of a crime punishable by imprisonment and who does not have the financial ability to hire counsel.
Delaware	Each indigent person who is under arrest or charged with a crime if the defendant requests it or the court so orders [In practice counsel is appointed for all but traffic offenses. 57 *Iowa Law Rev.* 597, 807 (1972)].	Del. Code Ann. 29 §4602 (1974).		
Hawaii	Any offense punishable by confinement in jail or prison.	Hawaii Rev. Stat. §802-1.		
Indiana	All criminal prosecutions.	Ind. Const., Art. 1 §13.		
Louisiana	At each stage of the proceedings, every person is entitled to assistance of counsel of his choice or appointed by the court if he is indigent and charged with an offense punishable by imprisonment.	La. Const., Art. 1 §13 (1974) La. Code Crim. Proc. Art. 513 (Supp. 1975).	*State v. Coody*, 275 So. 2d 773 (La. 1973).	Pre-*Argersinger*, appointment of counsel limited to felony cases (1967).

State	Offenses To Which The Right To Counsel Applies	Statute Or Rule	State Court Decision	Legislative History
Massachusetts	Any crime for which a sentence of imprisonment may be imposed.	Mass. Sup. Jud. Ct. Gen. R. 3.10.	*MacDonald v. Commonwealth*, 353 Mass. 277, 230 N.E. 2d 821 (1967).	
Michigan	Any case where the court may impose a sentence of imprisonment.	Ad. Order— S. Ct. of Mich. July 27, 1972.	*People v. Harris*, 45 Mich. App. 217, 206 N.W. 2d 478, 480 (1973) ("Defendant has right to appointment of counsel at trial even though he is charged only with a misdemeanor offense, conviction of which could subject him to imprisonment.")	
Minnesota	Any case which may lead to incarceration.		*State v. Borst*, 277 Minn. 388, 154 N. W. 2d 888 (1967); *Wertheimer v. The State*, 294 Minn. 293, 201 N.W. 2d 383 (1971).	
New Hampshire	In every criminal case in which the defendant is charged with a felony or a misdemeanor.	N.H. Rev. Stat. Ann. §604-A:1 to 2 (Supp. 1973).		Prior law did not provide counsel in petty offenses and misdemeanors not punishable by imprisonment or a fine exceeding $500.

State	Offenses To Which The Right To Counsel Applies	Statute Or Rule	State Court Decision	Legislative History
New Mexico	If any person charged with any crime that carries a possible sentence of imprisonment appears in any court without counsel, the judge shall inform him of his right to be represented by the district public defender at all stages of the proceedings against him.	N. Mex. Stat. Ann. §41-22 A-12 (2) (Supp. 1973).		
New York	Every action charging a misdemeanor.	CPL §170.10.3(c) (does not apply where charge limited to traffic infraction).	*People v. Weinstock*, 80 Misc. 2d 510, 511, 363 N.Y. S. 2d 878 (1974) (advise of right to counsel and appointed counsel if indigent where defendant is charged with traffic violation and subject to possible imprisonment).	
Ohio	Appointment of counsel where the possible penalty is imprisonment.	Ohio R. Crim. Proc. 44 (A) to (B) (1973) Ohio Rev. Code §2941.50 (1974).		Pre-*Argersinger*, appointment of counsel for felonies only.
Oklahoma	In all criminal cases.	Okl. Stat. Ann. §22-464,1271 (Supp. 1974).	*Hunter v. State*, 288 P. 2d 425 (Okl. 1955); *Stewart v. State*, 495 P. 2d 834 (Okl. 1972).	

State	Offenses To Which The Right To Counsel Applies	Statute Or Rule	State Court Decision	Legislative History
Oregon	In all criminal prosecutions where imprisonment is a possible sanction.	Oregon Const., Art 1 §11.	*Brown v. Multnomah County District Court*, 29 Ore. App. 917, 566 P. 2d 522, 525 (1977).	
South Dakota	In any criminal action in the circuit, municipal or district county court, judge shall assign at any time following arrest, counsel for indigent defendant's defense.	S.D. Comp. Laws Ann. §23-2-1 (1975).		
Tennessee	Every person accused of any crime or misdemeanor whatsoever, is entitled to counsel.	Tenn. Code Ann. §40-2002.		
Texas	An accused charged with a felony or misdemeanor punishable by imprisonment.	Tex. Code Crim. Proc. Art. 26.04 (1965).	*Trevino v. State*, 555 S.W. 2d 750, 751 (Tex. Crim. App. 1977).	
Washington	All criminal proceedings for offenses punishable by loss of liberty regardless of their denomination as felonies, misdemeanors or otherwise.	Wash. J.Cr.R. 2.11(a)(1).	*McInturf v. Horton*, 85 Wash. 2d 704, 538 P. 2d 499 (1975).	
Wisconsin	Whenever a defendant is charged with a crime, the penalty for which includes the requirement or option of incarceration.		*State ex rel. Winnie Harris*, 75 Wis. 2d 547, 249 N.W. 2d 791, 796 (1977).	

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1177

AUBREY SCOTT,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

Does the Sixth Amendment as applied to the states by the Fourteenth require appointment of counsel in criminal proceedings where the sole penalty imposed is a small fine?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining his defense."

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

Ill. Rev. Stat. ch. 110A, § 612(j) (1971):

> "The following civil appeals rules apply to criminal appeals insofar as appropriate:
>
> (j) Contents of briefs: Rule 341."

Ill. Rev. Stat. ch. 110A, § 341(e)(7) (1971):

> "The appellant's brief shall contain the following parts in the order named:
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> Argument, which shall contain the contentions of the appellant and the reasons thereof, with citation of the authorities and the pages of the record relied on. . . . Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."

Supreme Court Rule 23, in pertinent part:

"1. The petition for writ of certiorari shall contain:

(c) The questions presented for review. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

Supreme Court Rule 40, in pertinent part:

"1. Briefs . . . shall contain . . .

(d)(1) . . . The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.

(2) The phrasing of the question presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented.

STATEMENT OF THE CASE

On January 19, 1971,[1] petitioner Aubrey Scott was apprehended for shoplifting and was charged, pursuant to Illinois Revised Statutes, chapter 38, § 16-1(A)(1), with the theft of an address book and sample case worth $13.68.[2]

On the scheduled day, petitioner appeared in the First Municipal District of the Circuit Court of Cook County for his first court appearance without an attorney. After being informed that he was charged with the offense of theft, petitioner indicated to the Court that he was ready for trial. At the Court's direction, petitioner was then arraigned; after being told that he was charged with theft, petitioner pleaded not guilty, again indicated that he was ready for trial, and waived his right to a jury trial. [A. 6-7].

The People called only one witness to testify, William Bray, the security guard at the Woolworth Store. Bray testified that on January 19, 1971, at approximately 6:00 P.M. he was on duty at the store when he saw petitioner

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1. Although the date of the offense as charged in the complaint and as testified to at trial was January 19, 1971, it is likely that the date of the offense was actually January 19, 1972, since the complaint was filed January 21, 1972 (A. 2) and the first court appearance was scheduled ten days later (A. 3).

2. Illinois Revised Statutes, chapter 38, § 16-1 (1969) contained the following penalty provision: "A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. A person convicted of such theft a second or subsequent time, or after a prior conviction of any type of theft, shall be imprisoned in the penitentiary from 1 to 5 years."

approach a sales girl and ask her to unlock an attache case. Bray further testified that he saw petitioner walk around the store with the briefcase for fifteen to twenty minutes, back and forth by the sales girls. During this time, Bray testified that Scott had a $10.00 bill in his hand and had picked up an address book and put it in his pocket. Bray then watched Scott another five minutes, walked out onto the street and observed Scott walk outside of the store with the attache case several moments later. When Scott was stopped, Bray testified that Scott said the attache case belonged to him. Bray testified that the attache case which Scott was apprehended carrying was the property of F. W. Woolworth and had a value of $12.95. [A. 7-8].

Petitioner then testified on his own behalf. He stated that after he had placed his articles in the attache case to see if it was the proper size he walked around the store looking for the salesgirl, but could not find her because of partial blindness. He testified that he was suddenly grabbed by the wrist and accused of shoplifting. He testified that he had money to pay for the briefcase but would not do so after he was accused of theft. [A. 8-9].

After the defendant testified, the People rested their case. (A. 9). The judge indicated that he had a lot of questions, and when the prosecutor stated he felt he had proved his case the judge asked Scott several questions. In response, petitioner testified that he had almost $300.00 in his pocket and was looking for the salesgirl when he was arrested. He further stated that he was arrested inside the store and did not go out on the street. The Court then stated, "I don't believe you, sir. Finding of guilty." [A. 10].

The judge then asked the court sergeant what evidence there was in aggravation, to which the sergeant replied that Scott had been sentenced to the House of Corrections in 1957 for thirty days for petty larceny. The Court then

sentenced petitioner to pay a fine of fifty dollars and no costs. The fine was promptly paid out of the bond deposit. [A. 5].

On February 29, 1972, petitioner filed a timely notice of appeal to the Illionis Appellate Court. On April 27, 1972, petitioner moved in the trial court for the appointment of an attorney as appellate counsel and for a free transcript on the grounds of indigency. Petitioner was thereafter treated as indigent for purposes of review of the trial court proceedings.

In the appellate court petitioner argued that his constitutional and statutory rights to appointed counsel were violated and that the predictive evaluation procedures described in *Argersinger* v. *Hamlin*, 407 U.S. 25, 42 (1972) were unconstitutional. The First District Appellate Court affirmed petitioner's conviction, specifically refusing to extend the rule of *Argersinger* to cases where only a small fine is imposed. (Appendix to petition for certiorari, 13a). The Court also held that Illinois Revised Statutes, chapter 38, § 113-3(b) (1969) did not require appointment of counsel in cases in which only a fine was imposed, and rejected petitioner's claims that predictive pre-trial evaluation was arbitrary and unconstitutional. [Appendix to petition for certiorari, 19a, 15a].

Petitioner then filed for leave to appeal to the Illinois Supreme Court, which granted petitioner leave to appeal. In that court petitioner argued that he had a constitutional and statutory right to appointed counsel. The Illinois Supreme Court found that petitioner was not entitled to appointed counsel under the applicable Illinois statutes or under the rule of *Argersinger*, and refused to extend *Argersinger* to a situation where a conviction resulted in the levying of a fine. [Appendix to petition for certiorari, 3a, 4a].

ARGUMENT

I.

THE SIXTH AMENDMENT DOES NOT REQUIRE APPOINTMENT OF COUNSEL AT STATE EXPENSE IN CRIMINAL PROCEEDINGS IN WHICH THE SOLE PENALTY IMPOSED IS A SMALL FINE.

A.

INTRODUCTION

In *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) this Court held that the right to counsel provision of the Sixth Amendment was obligatory on the States under the due process requirement of the Fourteenth Amendment. Later, in *Mempa* v. *Rhay*, 389 U.S. 128 at 134 (1967) the Court characterized *Gideon* as establishing "an absolute right to appointment of counsel in felony cases." Nine years after establishing the rule of *Gideon*, however, this Court in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972) refused to apply the same absolute rule to non-felony cases.[3] Instead, it

3. The term "non-felony" cases as used herein includes all misdemeanors and petty offenses punishable by imprisonment of any duration. *Argersinger* v. Hamlin, 407 at 37, made it clear that imprisonment without counsel was impermissible regardless of the classification of the offense. In reality, however, actual loss of liberty triggers the requirement of counsel only in non-felony cases, since appointment of counsel is required in all offenses classified as "felonies." *Mempa* v. *Rhay, supra.*

In *Argersinger*, the offense involved was characterized as "petty," *i.e.* punishable by imprisonment of less than six months. In January, 1972, all criminal offenses in Illinois were classified as felonies or misdemeanors. A misdemeanor was defined as "any offense other than a felony", Ill. Rev. Stats., ch. 38, § 2-11 (1969) and was punishable

(Footnote continued on next page)

focused on the consequences of non-felony convictions and prohibited the imposition of any sentence of imprisonment after conviction of an indigent defendant who did not have counsel. In this case since no imprisonment was actually imposed, appointment of counsel was not required by the rule of *Argersinger*. Petitioner argues, however, that the Sixth Amendment should be read to require appointment of counsel in all criminal proceedings in which a jail sentence is an authorized penalty regardless of whether jail time is in fact imposed. Respondent submits that imposition of a small fine is not a deprivation of sufficient magnitude to require appointment of counsel in light of the tremendous burden which such a requirement would impose on the States.

B.

Actual Loss Of Liberty Should Define The Boundaries Of The Right To Counsel In Non-Felony Cases.

1. Not All Crimial Actions Are Subject To The Sixth Amendment Right To Counsel Provision.

The right to counsel enunciated in the Sixth Amendment applies, as do the other rights enumerated therein, to "all

(Footnote continued from preceding page)

by a term of imprisonment of up to one year and/or a fine of $1,000. Ill. Rev. Stats., ch. 38, § 1-7 (1969). The present statutory scheme consists of a more elaborate classification. There are three classes of misdemeanors. Class A, providing for a maximum penalty of one year imprisonment and/or $1,000 fine; Class B, providing for a maximum penalty of six months imprisonment and/or $500 fine; Class C, providing for a maximum of thirty days imprisonment and/or $500 fine. Ill. Rev. Stats., ch. 38, § 1005-5-1, § 1005-5-2, § 1005-9-3 (1977). Theft under $150 under the revised classification system is a Class A misdemeanor. Ill. Rev. Stats., ch. 38, § 16-1(e)(1) (1977).

criminal prosecution." To argue, as does petitioner, that this language creates an absolute right to appoinment of counsel once a proceeding is denominated "criminal" ignores the consistent refusal of this Court to impose a literal meaning upon the words of the Constitution. This "absolutest" position, most consistently articulated and rejected in cases involving the rights of freedom of speech and association,[4] would prohibit placing any limitations on enumerated rights. Neither the history of the Sixth Amendment nor the precedents of this Court support the view that the burden imposed on the State cannot be considered in defining the scope of a right.

It has never been held that every action classified as criminal must be deemed a "criminal prosecution" for purposes of the rights enumerated in the Sixth Amendment. Indeed, the Court has expressly recognized that the right to jury trial is not constitutionally required in all criminal cases. In *Baldwin* v. *New York*, 399 U.S. 66, 75 (1970) Mr. Justice Black in his concurring opinion argued that the phrase "in all criminal prosecutions" could not be read to limit the right to jury trials to only serious prosecutions. Rejecting this literal reading, the Court balanced the advantages to the defendant against the administrative burden it placed upon the State and concluded that the right to a jury trial was guaranteed in all "serious of-

4. Justices Black and Douglas consistently opposed application of the balancing test in the context of the First Amendment rights, espousing the view that there could be no limitation imposed on those rights. *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 56 (1961) (dissenting opinion of Mr. Justice Black). See also, *New York Times Co.* v. *United States*, 403 U.S. 713, 720 (1970) (dissenting opinion of Mr. Justice Douglas) and citations contained at 720, n. 1.

fenses" but did not extend to "petty offenses", *i.e.* those punishable by less than six months imprisonment. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Baldwin* v. *New York*, *supra*. The Court explained the considerations relevant to its determination as follows:

> ". . . [T]he possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications." *Duncan* v. *Louisiana*, 391 U.S. at 161.

Although this Court in *Argersinger* refused to place exactly the same limitation on the right to counsel as on the right to jury trial, it did not thereby forbid placing any limitation on the right to counsel. Rejecting the argument that the right to appointed counsel should be limited to serious offenses as defined by *Baldwin*, *supra*, the Court nevertheless limited the right to counsel according to a standard focusing on the actual loss of liberty to the accused. The adoption of this approach exemplifies the use of the balancing test. Faced with the alternatives of allowing an accused to be deprived of his liberty without counsel or requiring the States to provide counsel for all indigents accused of any criminal offense, the Court imposed a standard accommodating both the rights of the accused and needs of society. By so doing, it reaffirmed both the constitutional validity and practical necessity of developing the "evolving concept" (407 U.S. at 44) of the right to counsel in light of the burden it would impose on society.

Neither the historical background of the Sixth Amendment nor the fact that many of the other Sixth Amendment rights have not been limited lend weight to petitioner's

assertion that the right to counsel must extend to all criminal actions. The fact that at common law there was a right to counsel for petty offenses but not for serious ones is not determinative of the present constitutional scope of the right to counsel. It has been suggested that the reasons behind this seemingly illogical distinction stemmed from the fact that the State had only a slight interest in convicting petty offenders and could therefore afford to be generous![5] This is hardly an acceptable rationale within the present constitutional framework where right to counsel has been interpreted as requiring "effective assistance of counsel." *McMann* v. *Richardson,* 397 U.S. 759, 771 n. 14, and cases cited (1970). Furthermore this Court has extended the right to appointed counsel to felonies despite evidence that the framers of the Sixth Amendment did not intend to provide appointed counsel in any cases.[6]

It is true that the Sixth Amendment rights other than the right to jury trial have never been defined on the basis of seriousness of the offense or of the penalty. Thus, the rights to a public and speedy trial, to compulsory process, to confront witnesses and to be informed of the nature of the accusation do not depend on the seriousness of the offense charged. (*Argersinger* v. *Hamlin,* 407 U.S. 27-29). The State, however, has no compelling pecuniary interest in a narrow definition of those rights, since the cost of their implementation is negligible. As has been pointed out

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5. Beaney, *The Right to Counsel in American Courts* 8 (1955).

6. Beaney, pp. 27-30.

7. Junker, John M. "*The Right to Counsel in Misdemeanor Cases,*" 43 Wash. L. Rev. 685, 707 (1968); Duke, Steven, "*The Right to Appointed Counsel; Argersinger and Beyond*", 12 Am. Cr. L.R. 601, 608 (1975).

by commentators,[7] it costs no more to provide a speedy and public trial in which the accused is given public notice of the charges than a delayed, secret trial without such notice. Similarly, limiting the right to confrontation and cross-examination has been found not to result in a substantial savings to the State.[8]

It is obvious that what the right to jury trial and the right to counsel have in common is their cost. Because they require considerable State expenditures, courts are asked to consider the burden these costs impose in developing the scope of these rights; no similar balancing is needed when considering the other Sixth Amendment rights.

Although petitioner urges that the right to counsel be extended to all criminal proceedings coextensively with the other Sixth Amendment rights excepting that of jury trial, there is no doctrinal prohibition against development of the right to counsel along lines completely different from either the Sixth Amendment rights which had been applied to all offenses or those applied to non-petty offenses only. The limitations already developed on the right to jury and to counsel show that each of the enumerated Sixth Amendment rights need not be uniformly treated and that "criminal prosecutions" need not have a fixed meaning independent of the particular right being asserted.

It is thus consistent with the prior decisions of this Court and with the development of the right to counsel for this Court to determine the boundaries of the cases to which that right applies on the basis of appraisal of the prerequisites of a fair trial in light of effective administration of criminal justice.

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8. Junker, at 707 and n. 128.

2. The Sanction Of Imprisonment, Traditionally Subject To Special Scrutiny, Is Inherently Distinguishable From Other Potential Consequences And Is A Rational Boundary For Drawing The Right To Counsel In Non-Felony Cases.

Actual loss of liberty was defined in *Argersinger* as providing the outer parameters for applying the right to counsel in non-felony cases. Since *Argersinger*, all of the federal circuit courts which have considered the issue have recognized that the Constitution does not require appointment of counsel in non-felony cases that do not result in actual deprivation of liberty.[9] More importantly, none of the circuit, except for the United States Court of Appeals for the Fifth Circuit,[10] have extended the right to counsel beyond that stated in *Argersinger*, thereby recognizing the soundness inherent in that rule.

A standard for right to counsel which distinguishes actual imprisonment from other sanctions comports with societal and judicial recognition that imprisonment is a unique sanction. Respect for liberty of an individual is the basic postulate upon which this nation was built. *Poe* v. *Ullman*, 367 U.S. 497, 542 (1967). Loss of that liberty has traditionally been viewed as a penalty which is inherently degrading, which stigmatizes an individual by its very imposition and which is almost exclusively imposed as a result of the criminal process. Because of these characteris-

9. *United States* v. *Sawaya*, 486 F. 2d 890, 892 (1st Cir. 1973); *In Re Di Bella*, 518 F. 2d 955, 957 (2nd Cir. 1975); *Marston* v. *Oliver*, 485 F. 2d 705 (4th Cir. 1973); *United States* v. *White*, 529 F. 2d 1390 (8th Cir. 1976); *Henkel* v. *Bradshaw*, 483 F. 2d 1386 (9th Cir. 1973); *Sweeten* v. *Sneddon*, 463 F. 2d 713 (10th Cir. 1972).

10. *Thomas* v. *Savage*, 513 F. 2d 536 (5th Cir. 1975).

tics, the imposition of imprisonment has always been subject to special scrutiny: "... [T]his Court will squint hard at any legislation that deprives an individual of his liberty —his right to remain free." *Williams* v. *Illinois*, 339 U.S. 235, 263 (1969).

Focus on loss of life and liberty has also been the benchmark of this Court's decisions regarding the right to counsel. In *Powell* v. *Alabama*, 287 U.S. 45 (1932), a capital case in which the court reversed convictions of defendants under sentence of death for failure to appoint counsel, the Court enumerated circumstances requiring appointment of counsel and focused "above all" on the fact that the defendants "stood in deadly peril of their lives." 287 U.S. at 71. Similarly in *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), the Court in holding that counsel must be appointed for indigents in the federal courts repeatedly stressed that an accused could not be deprived of his "life or liberty" without the assistance of counsel. 304 U.S. at 462, 463, 468.

Argersinger elevated loss of liberty to the level of a constitutional standard. Although noting that *Powell* v. *Alabama*, *supra*, and *Gideon* v. *Wainwright*, *supra*, were felonies, the Court found their rationale applicable "to any criminal trial, where an accused is deprived of his liberty." 407 U.S. at 32. The special status of penalties resulting in actual imprisonment was most clearly shown by the Chief Justice, who would have applied the six month potential imprisonment rule defining the right to jury trial to the right to counsel as well, except for the fact that "any deprivation of liberty is a serious matter." 407 U.S. at 40.

When compared with the grave concern with which courts have traditionally viewed loss of liberty, the imposition of a small monetary exactment is inherently distin-

guishable. This Court gave explicit recognition to that difference in *Muniz* v. *Hoffman*, 422 U.S. 454, 477 (1975) where it held that imposition of a $10,000 fine did not require that defendants be afforded a jury trial:

> "It is one thing to hold that deprivation of an individual's liberty beyond a six-month term should not be imposed without the protections of a jury trial, but it is quite another to suggest that, regardless of the circumstances, a jury is required where any fine greater than $500 is contemplated. From the standpoint of determining the seriousness of the risk and the extent of the possible deprivation faced by a contemnor, *imprisonment and fines are intrinsically different.*" (Emphasis added).

Petitioner does not contend that imposition of a fine is equivalent to a loss of liberty; clearly it is not. Citing *Mayer* v. *City of Chicago*, 404 U.S. 189 (1971), however, he does argue that the *de minimus* nature of the fine cannot be used as a basis for not assigning counsel. (Pet. Br. 43-44). The inapplicability of petitioner's analogy is demonstrated by focusing on the result of each alleged deprivation. In *Mayer* the Court prohibited the denial of free transcripts to indigents on the basis that the offenses were nonfelony or punished by fine only. The denial of transcripts to an indigent, where the burden is on the defendant to procure transcripts and demonstrate error, is a denial of all access to the appellate review process based on an individual's poverty. If counsel is not appointed in a nonfelony case, however, defendant nevertheless has access to a trial in which he is presumed to be innocent, in which the State must prove him guilty beyond a reasonable doubt and which cannot, upon conviction, result in his imprisonment.

In Illinois, as in most States, conviction of a misdemeanor can, although it infrequently does, result in a sentence of probation.[11] Although the question of whether probation imposes a deprivation of sufficient magnitude to require counsel is not before this Court in this case, the significant distinction between sentences of imprisonment and probation should be noted when advocating a rule requiring appointment of counsel only when a jail sentence is imposed.

As this Court has noted, although probation infringes on personal freedom, it does so considerably less than does imprisonment. *Frank* v. *United States*, 395 U.S. 147, 151 (1968). This is especially true in non-felony cases, where the terms of probation imposed will most likely be of the least restrictive variety, usually requiring only monthly reports to a probation officer. More importantly, as a practical matter, the goals of the sentence of probation, together with the costs of such services, dictate that probation be imposed as a sentence in only the more serious misdemeanors. By virtue of their seriousness, however, these cases will already be screened out under the pre-trial evaluation system as cases in which the imprisonment option must remain an available alternative.

In addition to the actual sentence imposed, there may also be collateral consequences to a defendant as a result of a conviction. Thus, as petitioner points out, besides

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11. There are three variants of probationary status provided: "probation", Ill. Rev. Stats., ch. 38, § 1005-1-18, 1005-6-2 (1977); "conditional discharge", Ill. Rev. Stats., ch. 38, § 1005-1-4, 1005-6-2 (1977); and "supervision", Ill. Rev. Stats., ch. 38, § 1005-1-21, 1005-6-3.1 (1977). Successful completion of conditions of "supervision" results in dismissal of charges. Ill. Rev. Stats., ch. 38, § 1005-6-3.1 (e)(f) (1977).

the stigma attached to a conviction, a non-felony conviction could also affect his eligibility for certain jobs or be used for impeachment purposes. (Pet. Br. 44). Petitioner argues that these consequences may be more severe than imprisonment and therefore require appointment of counsel. To determine the necessity for counsel, however, on the basis of the actual consequences of the deprivation to that individual would be an unworkable standard. As has previously been recognized by this Court, there are frequently difficulties attendant upon drawing boundaries because "it requires attaching different consequences to events which, when they lie near the line, actually differ very little" *Duncan* v. *Louisiana*, 391 U.S. at 161. The characteristics inherent in the sanction of imprisonment provide a recognized, rational and distinguishable boundary. That the consequences of revoking a driver's license may be more significant to one individual than another cannot be determinative of the constitutionality of drawing boundaries. If it were required that the consequences of punishment be comparable for all individuals,

> ". . . . [T]he State would be forced to embark on the impossible task of developing a system of individualized fines, so that the total disutility of the entire fine, or the marginal disutility of the last taken, would be the same for all individuals." *Williams* v. *Illinois*, 399 U.S. 235, 261 (1970) (Harlan, J., concurring).

Lastly, the collateral consequences which accrue to the individual as a result of a conviction of a misdemeanor do so only after that individual has had a hearing in which he was found guilty beyond a reasonable doubt. To subject an individual to collateral consequences after a judicial determination as to credibility of witness and evidence has been made and after a finding of guilty beyond a reasonable doubt is consistent with the constitutional mandate. Had

there been any question of sufficiency of evidence, or unfairness at the trial, petitioner in this case would have raised those issues in the Illinois Courts. The fairness of the trial would then have been reviewed, thus providing safeguards against collateral consequences of a conviction of which he was innocent. That he did not do so shows the fairness of the proceedings.

Petitioner also attacks the use of actual imprisonment as the basis for requiring counsel on the ground that the standard will render sentences themselves of dubious effectiveness, because the indigent uncounseled defendants will be immune from sanctions for non-payment of fine or violation of probation. Additionally he argues that the violations would be unavailable for subsequent enhancement of penalties under second offender statutes. (Pet. Br. 34-35).

There has been some question as to whether failure to pay a fine which results from an uncounseled conviction can result in imprisonment. After *Tate* v. *Short*, 399 U.S. 235 (1970), states are prohibited from converting a fine into a prison term for indigents unable to pay the fine. See, *e.g.*, Ill. Rev. Stats., ch. 38, § 1005-9-3(b)-(c) (1977). For those financially able but refusing to pay the fine, however, the subsequent proceeding to enforce the fine has been held by some courts to be a contempt proceeding, separate and sufficiently removed from the original conviction so as to permit imprisonment for non-payment. *Rollins* v. *State*, 299 So. 2d 586 (Fla. 1974).

With respect to the use of an uncounseled conviction as the basis of a probation revocation proceeding or to enhance a subsequent offense, the use of such convictions to incarcerate an individual depends on how direct the first conviction is to imprisonment. Generally such use has been

prohibited. Krantz, et al., *Right to Counsel in Criminal Cases: The Mandate of Argersinger* v. *Hamlin*, 35-37, 44 (1976) hereinafter cited as Krantz. This result, however, is not inconsistent with state purposes but is legitimately within the realm of prosecutorial discretion. When prosecuting an offense the prosecutor knows that by not requesting that counsel be appointed for defendant, he will be precluded from enhancing subsequent offenses. To the degree that the charging of offenses involves a great deal of prosecutorial discretion and selection, the decision to pursue conviction with only limited use comes within proper scope of that discretion.

Finally, the function of ensuring the effectiveness of legislative sentences is properly a judicial and legislative function of local government. If the States find that they cannot enforce the penalties they are enacting because of *Argersinger* prohibitions, appropriate adjustment suitable to the needs of each particular locality can be made at the local level. This Court should not engage in constitutional rulemaking to ensure what is properly a legislative function.

C.

The Right To Appointed Counsel Should Not Be Applied To All Offenses Punishable By Imprisonment Because The Costs Of Such Extension Would Far Exceed The Benefits Which Attorneys Could Provide In Those Cases.

1. The Benefits Derived From Assistance Of Counsel Is Minimized By The Nature Of Proceedings In Non-Felony Courts.

Consideration of the nature of the proceedings and the role of lawyers in non-felony courts provides additional support for using actual imprisonment to draw the boundary of the right to appointed counsel. In *Gideon* v. *Wainwright*, 372 U.S. at 335, the Court based it conclusion that lawyers are necessities in criminal courts on the fact that the government hires prosecutors and that non-indigents hire lawyers:

> "Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can to prepare and present their defenses."

While the stakes in felony cases are such that most defendants would not forego assistance of counsel if it were within their means,[12] those charged with non-felony violations frequently do not employ counsel.[13] The cost of hiring counsel in minor cases is typically weighed against the potential benefit of the attorney's services. This is especially true where the possibility of jail seems remote and the probable fine small (407 U.S. at 49) since attorney costs would frequently exceed the amount of the fine. To the vast majority of the population, hiring an attorney to defend against minor offenses would indeed be a "luxury."

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12. D. Oaks, *The Criminal Justice Act in the Federal District Courts* III-36 (1967).

13. For example, in a survey conducted by the Illinois Law Enforcement Commission of 9,436 misdemeanor cases tried in the State of Illinois in 1976, it was found that 49.4% of defendants were not represented by counsel; only 23.8% had retained counsel; the remainder of the defendant population was represented by public defenders or assigned counsel. From Defense Services Survey, Illinois Law Enforcement Commission, Planning Division (1977). See also *Argersinger* v. *Hamlin*, 407 U.S. at 49-50, where Mr. Justice Powell points out the anomaly created by extending the right of appointed counsel to cases where non-indigents would rarely retain counsel.

Moreover, the nature of the proceedings in the non-felony courts are significantly different from those in felony courts. In *Johnson* v. *Zerbst*, 304 U.S. 458, 462-3 (1938) the Court stated that:

> "The Sixth amendment . . . embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, *wherein the prosecution is presented by experienced and learned counsel.*" (Emphasis added).

The reality of misdemeanor courts, however, is that procedures are informal and rules of evidence are not strictly adhered to. The instant case, typical of those arising in high volume urban non-felony courts, is indicative of the relaxing of the "adversarial" context. The prosecutor should properly have been expected to "present evidence to the court, challenge any witnesses offered by the defendant, argue the rulings of the court and make direct arguments to the court" to establish petitioner's guilt. *Ross* v. *Moffitt*, 417 U.S. 600, 610 (1974). The prosecutor here, however, made neither opening nor closing statements, did not object to any testimony offered by petitioner, did not question or cross-examine petitioner, and did not call rebuttal witnesses. His role was merely one of eliciting testimony from the State's witness.

Nor is this an unusual situation. As has been pointed out, new lawyers entering the field of prosecution are traditionally assigned to the misdemeanor and traffic dockets and view assignment to a felony caseload as a significant promotion.[14] These inexperienced prosecutors often have an

14. U. S. President's Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in a Free Society* 128 (1967), hereinafter cited as *The Challenge*.

excessive caseload, do not see the file or complaint until actually in the courtroom, and frequently never talk to the witnesses prior to calling them to testify. That they are required at all is perhaps recognition that the prosecution has the burden of proving guilt beyond a reasonable doubt and that failure to prove an element of the offense, or identify, or venue can result in dismissal of the case for technical reasons. In fact, in some non-felony courts, there are no prosecutors; in such cases the judge asks questions after police presentation of their case.[15] In a recent survey of misdemeanor courts, it was reported that even with appointed counsel present, the trials which were conducted were characterized by lack of formal motions, non-existent cross-examination and quick disposition of cases.[16] The comment of one observer watching the processing of non-felony cases in a municipal courtroom was that they seemed to be processed at the rate of one per minute.[17]

It is therefore apparent that the adversarial system characterized by petitioner as being incomprehensible to the layman and the basis for his need for assistance of counsel is in reality not nearly as adversarial as he suggests.

15. Observation of Belle Glade, Florida, Municipal Court, where it was noted that non-attorney cases were not limited to the indigent. Krantz, *supra* at 210. See also, *The Challenge*, *supra* at 128.

16. Observations of Cleveland Municipal Court, Krantz, *supra*, at 205. Similar observations were made of court systems in San Jose, Texas, where defense counsel consulted with newly assigned defendants in the courtroom, often while proceedings continued. In all of the jurisdictions observed, it was noted that the majority of the cases were immediately plea bargained. Krantz, *supra*, at 203-210.

17. Krantz, *supra*, at 205. Observation of Cleveland Municipal Court.

Indeed, petitioner's arguments that failure to appoint counsel negated his other Sixth Amendment rights cannot withstand scrutiny if viewed in the context of the reality of the overcrowded misdemeanor courts described.

Just as the overriding pressure for plea bargaining is an undeniable reality in misdemeanor court, so also is the actual rarity of the jury trial.[18] Under Ill. Rev. Stats., ch. 38, § 103-6 (1969) and under *Duncan* v. *Louisiana, supra,* petitioner would have been entitled to a jury trial. Since he waived that right in response to a question from the court (A. 7), petitioner's argument is inapplicable to the instant case. It is, however, far from clear that the goals of a trial as a fact finding mechanism for ascertaining whether an accused individual committed a crime cannot be achieved by an unrepresented defendant before a jury.[19] This Court has never held that the right to appointed counsel exists in every case where there is a right to jury trial.[20] To hold

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18. Report of the Public Defender of Cook County, Municipal Districts 2-6 (Suburban districts, excluding City of Chicago) from 12/1/77 to 6/30/78 shows that the Office of the Public Defender disposed of 4997 Traffic and Misdemeanor cases during that period of time. Of the 4997 cases, there were 8 jury trials. (The remaining cases were disposed of as follows: "Plea of guilty"—2003; "Supervision"—2339; 'Plea of Not Guilty-Finding of Guilty"—276 (bench); "Plea of Not Guilty-Finding of Not Guilty"—371 (bench).

19. See, *e.g. Faretta* v. *California,* 422 U.S. 806 (1975) where defendant held to have the right of self-representation in a jury trial involving a felony charge.

20. *Argersinger* contains some support for both positions. Chief Justice Burger, by directing the prosecutor in a jury case to help the judge decide regarding the significant likelihood of imprisonment, indicated that the right to

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that the right to counsel must be coextensive with the right to jury trial would require the State of Illinois to either limit the right to jury trial which presently exists in all criminal cases, including those punishable by fine only and traffic offenses, or to extend the right to counsel to all those offenses. The former result is undesirable in view of the legislative intent to provide a broad right to jury trial in this State—broader, in fact, than constitutionally required. *Duncan* v. *Louisiana, supra.; Baldwin* v. *Illinois, supra.* The latter result would be prohibitively expensive and probably not chosen. Under the guise of interpreting the Sixth Amendment's broadly worded principle, the State of Illinois should not be put to the Hobson's Choice which petitioner's theory creates.

2. The Costs Of Providing Counsel For Indigents In All Non-Felony Cases Would Impose A Tremendous Burden On Society.

In determining the scope of the right to counsel which must be provided to indigents in non-felony cases, this Court must consider the economic burdens which will be imposed upon the courts by any extension of the right to counsel beyond *Argersinger.* As stated by the Chief Justice in his dissenting opinion in *Faretta* v. *California,* 422 U.S. 806, 845 (1975):

> "Society has the right to expect that, when courts find new rights implied in the Constitution, their potential effect upon the resources of our criminal justice system will be considered."

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jury trial is independent of and does not require the right to appointed counsel. 407 U.S. at 42. Justice Powell, however, stated that the right to counsel line must be drawn "so that an indigent has a right to appointed counsel in all cases in which there is a due process right to a jury trial." 407 U.S. at 46.

In *Argersinger,* Mr. Justice Powell detailed a number of concerns regarding the costs of implementing the rule announced in that case, 407 U.S. at 56-63. If, as petitioner claims (Pet. Br. 37, n.21), *Argersinger* did not in fact impose extraordinary burdens on court systems, that may well be because incarceration is not commonly contemplated or imposed in non-felony cases.[21] Comprehensive post-*Argersinger* studies, however, belie not only petitioner's assertions regarding the impact of *Argersinger,* but also his claim that further extensions will not impose impossible burdens on a great number of local court systems.

As predicted (407 U.S. at 61), the court systems most burdened by the *Argersinger* extension of the right to assigned counsel were those of small rural communities. In its 1973 survey of defender systems, the National Legal Aid and Defender Association studied 2227 counties with over one-third of the country's population which did not have defender systems but utilized appointed private counsel to defend indigents. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, L. Benner and B. Lynch-Neary, *The Other Face of Justice: A Report of the National Defender Survey* 38 (1973) (hereinafter cited as *The Other Face of Justice*). These jurisdictions had great difficulties implementing *Argersinger,* due to both lack of attorneys and the incapability of local governmental units to support such services. *Id.,* at 38-40, 63. The NLADA study reported the following assessment of one judge on the impact of *Argersinger* on their system in South Dakota: "... [A]lmost the straw that broke the camel's back." *Id.,* at 38.

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21. Krantz, *supra* at 366, 417. Additionally, the survey suggests that at least in one community there was a sizeable decrease in the frequency of imposed jail sentences after *Argersinger.*

More ominously, however, the results of the survey showed in many jurisdictions judges were simply not incarcerating misdemeanor defendants because of the inability to provide counsel for them. *Id.,* at 40, 64. Thus, an extension of *Argersinger* to prohibit *any* conviction without counsel would fulfill the prediction of Mr. Justice Powell: that those 2227 counties "simply could not enforce [their] own laws", 407 U.S. at 61.[22]

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22. The problems experienced by one town in the small predominantly rural State of South Dakota due to scarcity of lawyers was described in *Argersinger,* 407 U.S. at 61 (Powell, J. concurring). The problems of the 253 towns in South Dakota with no resident attorneys and of the counties with only one lawyer (usually the State's Attorney) are described in *Application of Wright,* 189 N.W. 2d 447 (1971), vacated by 407 U.S. 918; on remand 199 N.W. 2d 600 (1972).

The same problems are faced by rural areas in larger industrial states such as Illinois. Out of a total number of 102 counties in Illinois, 13 counties have fewer than 10 attorneys, and another 34 have fewer than 20. See "Report of Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois, April, 1978."

The difficulties which rural counties will encounter if required to appoint counsel for indigents in all non-felony cases punishable by imprisonment are illustrated by the attorney population and caseload of Brown County, Illinois. That county is one of the smallest in Illinois, with a population of 5,586; there is no public defender system, and private counsel is assigned to indigents when required. Ill. CRIMINAL DEFENSE OF INDIGENTS IN ILLINOIS, REPORT TO THE ILLINOIS LAW ENFORCEMENT COMMSSION, ILLINOIS DEFENDER PROJECT DEFENDER SURVEY 21 (1974) (hereinafter cited as ILLINOIS DEFENDER SURVEY).

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Nor are the problems of requiring increased representation limited to rural areas. There are approximately 1,250,000 to 2,710,820 indigent non-traffic misdemeanor defendants arrested annually.[23] The increase in attorneys needed

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In 1976 the number of new charges filed in Brown County were as follows: 15 felonies, 46 misdemeanors, 853 traffic and 34 conservation violations. *ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, 1976 ANNUAL REPORT TO THE SUPREME COURT OF ILLINOIS 125.* Applying the national 65% indigency rate for felonies (*infra,* n.23), to the 1976 figures under the *Argersinger* standards, appointed counsel was required for 10 felony cases and for any other offense in which imprisonment was imposed as the sentence. If the "authorized imprisonment" standard had been in effect in 1976, applying the 47% national indigency rate for non-felonies (*infra,* n.23) to the total number of non-felony offenses shows that appointed counsel would have been required in approximately 420 non-felony cases.

There are seven attorneys in Brown County, including the county judge and the state's attorney. The difficulty of attempting to obtain representation for 420 additional cases from the other five attorneys in the county is obvious. This difficulty is highlighted by consideration of the legal disabilities which preclude a number of these attorneys from accepting appointments to represent indigent defendants (*e.g.* partnership association with part-time state's attorney; position as City Attorney; part-time position as Assistant Attorney General, see *People* v. *Cross,* 30 Ill. App. 3d 199, 331 N.E. 2d 643 (4th Dist. App. 1975).

23. *The Other Face of Justice, supra* at 72 reports an annual figure of 2,710,821. Other estimates are as low as 1,250,000. *See generally* Duke, *supra;* Rossman, "*The Scope of the Sixth Amendment: Who Is A Criminal Defendant,* 12 Am. Crim. L. Rev. 663 (1975). The large differences in

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to represent indigent defendants charged with non-traffic misdemeanors if the *Argersinger* rule is expanded to require representation whereever imprisonment is authorized would be overwhelming.[24] For example, it was estimated that adoption of the authorized imprisonment standard in Birmingham, Alabama would require expenditures of amounts ten times the existing spending level. Krantz,

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numbers can be partially explained by differences in estimates of how many non-felony defendants would meet necessary indigency standards. Thus, although petitioner cites 10% as the percentage of misdemeanor defendants qualifying for appointed counsel (Pet. Br. 39), more realistic studies have found that 47% of the total misdemeanor population is indigent (compare, 65% indigency rate for felonies). *The Other Face of Justice, supra* at 82-83.

Confirming the above, a similar study in Illinois showed indigency rates for misdemeanors ranging from 31% to 68.3%. The average for all areas was substantially similar to the 47% rate found by the NLADA. ILLINOIS DEFENDER SURVEY, *supra* at 53.

24. The NLADA in 1973 found that there were fewer than 3,000 full time public defenders handling all the representation of indigents—both felony and misdemeanor—in the nation. It is estimated that under an "authorized imprisonment" standard, 4,794 full time defenders would be required to represent the non-traffic misdemeanor indigents alone. (In arriving at this figure, the NLADA assumed that approximately one-fourth of the representation required by indigent misdemeanants would be handled by appointed counsel).

It should be noted that these statistics have been subject to some criticism, see Krantz, *supra* at 12, 14. They are indicative, however, of the great increase in the number of public defenders that would be required by the adoption of petitioner's proposed standards.

supra at 361. Similar increases would also be required in other urban areas.[25]

The potential burden of adopting a rule requiring the appointment of counsel for all cases authorizing imprisonment is most extremely illustrated by the prospect that ap-

25. In Cleveland, Ohio, it was estimated that the adoption of an authorized imprisonment standard would require indigent representation at ten times the level then being provided. Representation was provided for 700 to 1300 indigent misdemeanants under the *Argersinger* standard; approximately 7,000 would require representation under the "authorized imprisonment" standard. Krantz, *supra* at 417.

An approximate idea of the potential dollar cost of an expanded counsel requirement can be obtained by looking at the budget of the Cook County Public Defender's Office. In 1977, 72 assistant public defenders handled 61,505 "municipal district" cases (these include misdemeanors, appearances on felonies through preliminary hearings and probation violation petitions) at a total salary cost of $1,740,540. The operation of this portion of the office was almost 23% of the total operational budget of the office ($7,603,923.63). (The Annual Appropriation Bill for 1977, approved and adopted February 24, 1977; County Board of Commissioners, Cook County, Illinois, pp. 228-229. Cook County Budget for Fiscal Year 1978, passed February 14, 1978, Cook County. Report of Proceedings, p. 1275).

In 1977, the number of "municipal district" cases disposed of in the Circuit Court of Cook County totaled 309,673. The number of traffic cases terminated totaled 1,471,336. (Administrative Office of the Illinois Courts, "Statistical Report on the Circuit Court of Cook County, Illinois for Calendar Year 1977," April 17, 1978; to be published in *Administrative Office of the Illinois Courts, 1977 Annual Report to the Supreme Court of Illinois*).

Applying a 47% indigency rate (see n.23, *supra*) to the total "municipal district" caseload results in a total of

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pointment of counsel will be necessary in all traffic offenses.[26] The potential burden is staggering: an estimated 50 million moving traffic violations are processed annually throughout the country. It has been estimated that as many as 23,500,000 traffic offenders could qualify as indigents and therefore be entitled to appointment of counsel. *The Other Face of Justice, supra* at 76, n.42; 83. Since in the United States most violations of traffic rules are considered criminal acts,[27] an adoption of the "authorized imprisonment"

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144,746 cases which would require representation. That figure would more than double the workload of the public defenders in the "municipal district" section, adding an additional 83,241 cases to the present 61,505 case workload; alternatively, hiring additional lawyers to handle the increased workload could potentially more than double the salary allocation needed for that division, making it close to $4,000,000.

Applying the same 47% rate of indigency to traffic offenses (see *The Other Face of Justice, supra* at 83) there could be as many as 691,522 indigent traffic offenders requiring representation. (Statistics describing the number of public defenders presently handling indigent traffic cases, or the costs of such representation were unavailable; no estimate has therefore been made of the potential costs of requiring appointment of counsel for indigent traffic offenders).

26. Petitioner advocates a standard requiring the appointment of counsel for all offenses punishable by imprisonment, including traffic violations, taking the position that exclusion of even minor traffic violations would be arbitrary so long as they carry a possible penalty of imprisonment. (Pet. Br. 16 and n.4).

27. Krantz, *supra* at 595, n.75, citing Arthur Young & Co., *A Report of the Status and Potential Implications of Decriminalization of Moving Traffic Violations* 3 (1972).

The Illinois Vehicle Code, Ill. Rev. Stats., ch. 95½, § 1, *et seq.* (1977) contains hundreds of possible traffic offenses,

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standard urged by petitioner will create a right to counsel of "astronomical proportions." Krantz, *supra* at 595.

The severity of the burden which adoption of petitioner's proposed standard would impose has been recognized by all the post-*Argersinger* studies. Most of those commentators, while advocating the extension of the right to counsel to all imprisonable offenses, have agreed that such an extension will tremendously over-tax the system. Krantz, *supra* at 124; Duke, *supra* at 618. They therefore accompany their advocacy of the extension of *Argersinger*, as does petitioner, with various proposals for reform.

One of the most frequent suggestions advanced is the decriminalization of offenses for which imprisonment is rarely imposed. Despite the fact that only a few states have de-

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carrying varying penalties depending on their misdemeanor classification (see n.3, *supra* describing misdemeanor classifications). Thus, for example, "driving while intoxicated" or "failure to give information or render aid" are class A misdemeanors, Ill. Rev. Stat., ch. 95½, § 11-501, § 11-403 (1977); "eluding a police officer" or "reckless driving" are class B misdemeanors, Ill. Rev. Stats., ch. 95½, § 11-204, § 11-503 (1977); "drag racing" or "providing false information" are class C misdemeanors, Ill. Rev. Stats., 95½, § 11-504, § 11-409 (1977).

Vehicle Code violations that are not specifically classified are considered "petty" and are therefore not punishable by imprisonment. Ill. Rev. Stats., ch. 95½, § 16-104, § 1-300; Ill. Rev. Stats., ch. 38, § 1005-1-17 (1977). However, conviction of a third or subsequent petty offense within a year is a class C misdemeanor, punishable by up to 30 days imprisonment. Thus, under the enhancement theory, to preserve the legislatively afforded option of imprisonment for the third offense, counsel would be required for all three charges. As a result, in Illinois appointed counsel would be required for all indigents charged with traffic offenses.

criminalized them, Krantz, *supra* at 598, this recommendation is most frequently made with respect to moving traffic offenses. Although the deterrent value of the threat of a jail sentence, even if rarely imposed, has been recognized as serving a legitimate social function, *Argersinger* v. *Hamlin*, 407 U.S. at 53-54 (Powell, J. concurring), the merits of the decriminalization suggestions are not properly debated in this Court. Those recommendations should be addressed to the legislative bodies of each of the states whose function it is to classify offenses and prescribe penalties. To ask this Court to adopt a rule, which by its effect would accomplish by judicial fiat what legislatures have refused to do, is to advocate judicial usurpation of legislative functions and a serious violation of the principle of federalism as well. This Court has in the past recognized that fact and has refused to substitute its judgment for that of state legislatures.

Petitioner further attempts to minimize the burden which his proposed rule would impose on the state by pointing to the fact that 22 states have already adopted such a rule.[28] (Pet. Br. 40). A review of the relevant state statutes shows the wide range of state approaches to the problem of providing counsel for indigent defendants. Different jurisdictions have adopted a variety of cutoff points for requiring counsel: some provide counsel for all non-felony offenses; others have excepted traffic offenses; still others have used

28. The Appendix to petitioner's brief lists 22 states which allegedly have extended the right to counsel to all offenses punishable by imprisonment. However, the statutes and caselaw of six of those states—Arizona, Connecticut, Michigan, Minnesota, Ohio and Texas—need not be read as requiring appointment of counsel for all imprisonable cases. While those states may require broader representation than that required by *Argersinger*, it is not yet clear that they require appointment of counsel for indigents in all cases punishable by imprisonment.

varying dollar limits and potential terms of imprisonment to delineate the scope of the right. (See Respondent's Appendix A).

What all of these boundaries reflect is a sensitive balancing between the rights of the defendant to be represented and the capacity of the particular system to provide representation. Legislatures are in the best position to decide what allocation should be made of their own dwindling resources in this era of tax revolt. The fact that some have chosen to allocate their available resources by extending the right to counsel beyond what is constitutionally required does not reflect on the constitutional necessity of such expansion. As this Court stated in *Ross* v. *Moffit*, 417 U.S. 600, 618 (1974) in describing states which did not provide counsel to indigent defendants seeking discretionary review on appeal:

> "Some states which might well choose to do so as a matter of legislative policy may conceivably find that other claims for public funds within or without the criminal justice system preclude the implementation of such a policy at the present time."

That approximately 16-22 states have already expanded the right to counsel beyond *Argersinger* is conclusive evidence only of the fact that 28-34 have not. Additionally it illustrates the already existing sensitivity of the states to a defendant's right to counsel and the tendency to expand it when possible.

In his attempt to minimize the burdens accompanying the adoption of an "authorized imprisonment" standard, petitioner also suggests that the additional costs of providing representation for non-felony indigents would be offset by the accompanying savings in court costs due to the more expeditious completion of cases. (Pet. Br. 41). It is likely, however, that exactly the opposite will occur. It is, for example, common to assign inexperienced attorneys to misdemeanor courts so they can "cut their teeth" in those courts. Krantz, *supra* at 165. Mr. Justice Powell in *Argersinger*, 407 U.S. 58-59, aptly summarized the multiple reasons why such inexperienced lawyers are likely to add to the congestion in the courts. Similarly, expediting the completion of cases is frequently not the goal of experienced lawyers, who often help cause delay either by reasons of necessity or as a matter of sound defense tactics.

Finally, respondent urges that the social cost of the broad rule advocated by petitioner is simply too great to permit its adoption. Lack of financial and manpower resources has seriously hampered many defender systems from providing effective representation for defendants for whom representation is presently required.[29] In rural communities both the cost of services and the scarcity of qualified attorneys pose great difficulties in procuring effective representation for indigents.[30] The problem of providing increased services continues to grow even without the imposition of additional requirements,[31] and, at the same time,

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29. *The Other Face of Justice*, *supra* at 77. Results of a survey conducted by NLADA showed that the most frequent recommendation made by judges and procesecutors to improve defender services was to increase the number of defender staff attorneys.

30. See *Partain* v. *Oakley*, 227 S.E. 2d 314 (W.Va. 1976), where the Court listed four factors which reduced the number of attorneys available for criminal representation and therefore increased stress on available resources: (1) increased complexity of criminal defense; (2) strict standard of performance required for criminal defense; (3) ongoing movement towards specialization; (4) attorneys entering governmental service or other areas not involving active practice of law.

31. Thus, for example, statistics for Cook County, Illinois, show a 258% increase in the pending inventory of

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there is no evidence that the number of attorneys qualified to provide indigent representation has increased.[32]

Respondent submits that this Court may take notice that there is a finite amount of resources available for allocation. This principle applies with equal force to Sixth Amendment resources, *i.e.* money available to pay lawyers for indigent defense. It is further not unrealistic to assume that many communities are already expending the maximum amount available on defender services, and also to note that, especially at present, tax rates are not likely to

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felony cases from 1972-1976, *Administrative Office of the Illinois Courts, 1976 Annual Report to the Supreme Court of Illinois 85* (hereinafter cited as *1976 Report to the Illinois Supreme Court*). Comparison of felony cases begun in 1972 and 1976 shows a 103% increase; a similar comparison of misdemeanor cases shows a 23% increase. *Id* at 35.

32. Suggestions that use of law students may ease the burden on defense systems have met with criticism on the grounds that law students do not meet the threshhold concept of counsel and that they are generally located in areas where there are numerous lawyers. Additionally, as a practical matter, the number of law students available for defense representation is small and cannot be expected to significantly supplement the existing defense services. Krantz, *supra* at 274-6.

In Illinois, senior law students can obtain temporary licenses under Illinois Supreme Court Rule 711, Ill. Rev. Stats., ch. 110A, § 711 (1977). This Rule allows law students, with the proper supervision, to participate in internship programs with legal aid offices, public defender offices and state or local agencies. In 1976 there were 530 law students participating in the program; 85 of these were associated with public defender offices. *1976 Report to the Illinois Supreme Court 78-79.*

be raised to accommodate increased costs of appointing counsel. It can therefore be expected that in many jurisdictions the response to an extension of the right to counsel would be simply to assign more cases to already overwhelmed public defenders.

Thus, the alternatives are well delineated. The resources available can be spent by providing attorneys for all defendants or by defining eligible defendants by an ascertainable criterion, such as actual imprisonment. To choose the former is to elect to provide what will amount to only pro forma representation for all indigent defendants at the expense of those who could derive the greatest benefit from a vigorous defense. Since such broad allocation of Sixth Amendment resources will necessarily limit the amount of assistance available to all, those facing the most severe consequences—loss of life or liberty—will necessarily bear the costs of such a choice. Neither these individuals nor society can afford so steep a price.

D.

Effectuation Of The "Actual Imprisonment" Standard By Use Of Predictive Pre-Trial Evaluation Comports With The Requirements Of Due Process.

In *Argersinger* v. *Hamlin*, 407 U.S. at 40, 41 this Court mandated that certain procedures be followed in non-felony trials if imprisonment was to be imposed as a sanction. Petitioner contends that this predictive evaluation procedure is inherently arbitrary, violative of due process and abrogates the intent of state legislatures to allow a trial court the full range of sentencing options. (Pet. Br. 31-33).

It is inconceivable that this Court would deliberately mandate a procedure by which trial courts would consistently violate the Fourteenth Amendment in reliance upon this

Court's judgment. In *Argersinger,* this Court specifically told the judges throughout the country that

> "Under the rule we announce today, every judge . . . will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts." 407 U.S. at 40.

Mr. Chief Justice Burger went on to explain that this measure of gravity would be obtained by a "predictive evaluation" to determine whether there was a "significant likelihood" that upon conviction incarceration would be imposed. The Chief Justice expressed confidence in the abilities of "an experienced judge, aided . . . by the prosecuting officer" to evaluate cases on a rational basis prior to trial. 407 U.S. at 42.

The feasibility of such "predictive evaluation" is demonstrated by the facts of this case. While there was no actual predictive evaluation in this case, which was tied approximately six months *before Argersinger* was decided, it is clear that any judge, sitting day after day in the misdemeanor courts of Cook County, with hundreds of shoplifting cases before him weekly, could glance at the complaint and immediately take cognizance of the following: (1) that worth of the property allegedly stolen was $13.68; (2) that the victim was a local dimestore; (3) that the offense was not charged under the enhancement portion of the theft statute. Those facts, together with a negative answer from the prosecutor to the question "do you intend to ask for jail time?", are sufficient to enable the "experienced" trial court judge to gauge with considerable accuracy the likelihood of a jail sentence, or more precisely, whether he wishes to preserve the option of imprisonment as a sentence.

This approach has the benefit of personalizing what has been called the "classes of offense" method of predictive evaluation,[33] *i.e.* isolating the classes of misdemeanors for which jail is almost never imposed from those in which a jail sentence is a real possibility. Such an approach in this case, for example, would permit recognition of the fact that shoplifters are generally punished with token fines only.[34] Thus, the frequency of shoplifting cases, Krantz, *supra* at 589, combined with the rarity of jail sentence, combine to permit a reasonable determination that the likelihood of jail sentence is virtually non-existent and the appointment of an attorney unnecessary.

Eliminating one potential sentence, unlikely to be imposed in any event, neither precludes rational individual sentencing of an individual subsequently convicted nor departs from traditional sentencing methods. Legislatures establish sentencing alternatives so that the trial court judges have a broad range of choices. This range is exemplified by the instant charge for which petitioner could have been punished by as little as a $1.00 fine or up to one year imprisonment. The Illinois Appellate Court in its opinion (Pet. for

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33. Although some commentators have preferred the "class-of-offense" standard to that of a case-by-case individualized predictive evaluation, see *e.g.* Junker, *supra* at 710; Duke, *supra* at 612, others have criticized it as usurping the power of the legislature to fix sentences by determining that for certain classes of cases an authorized penalty will never be used. Krantz, *supra* at 90-91.

34. Krantz, *supra* at 590, n.35, cites M. Cameron, *The Booster and the Snitch* 108 (1964) as reporting that the usual sentence for shoplifters in Chicago Municipal Court was "one day considered served, and one dollar considered payed."

Cert. 15a) stated that "in its predictive evaluation, the trial court is actually exercising the full range of its legislatively-afforded sentencing options by discarding some of those options in its search for the most appropriate sentencing alternative." Furthermore, the Illinois Supreme Court reviewed the predictive evaluation proceeding in light of the statutory requirements and found that it satisfied the legislative purpose.

Finally, petitioner urges that he was entitled to an on-the-record hearing and determination on the question of whether he was entitled to counsel. Failure to afford him such a hearing, he claims, was a denial of due process. (Pet. Br. 59).

Under *Argersinger,* there was no requirement for such a hearing; any error made in deciding not to appoint counsel was self-correcting since lack of counsel precluded a penalty of imprisonment. Nor does due process require that petitioner be accorded such a hearing, for even under the guidelines outlined by Mr. Justice Powell in his concurring opinion, 407 U.S. at 64, petitioner would not have been entitled to counsel. Neither the complexity of the offense, probable sentence or any individual factors set forth by petitioner would result in appointment of counsel in this straightforward shoplifting case in which a $50 fine was imposed.

II.

PETITIONER'S ARGUMENT THAT THERE IS A FOURTEENTH AMENDMENT RIGHT TO COUNSEL APART FROM THE SIXTH AMENDMENT RIGHT SHOULD NOT BE CONSIDERED BECAUSE IT HAS BEEN WAIVED; ALTERNATIVELY, IT SHOULD BE REJECTED.

A.

This Court Should Not Consider Petitioner's Claims That Failure To Appoint Counsel Violated Due Process And Equal Protection, Or His Contention That He Was Not Afforded A Fair Trial Because Petitioner Has Waived Those Issues.

Petitioner never alleged or argued in the state courts of review three issues which he now seeks to present for review: that the due process clause of the Fourteenth Amendment requires appointment of counsel (Pet. Br. II, 22-42); that the Equal Protection Clause of the Fourteenth Amendment requires appointment of counsel (Pet. Br. III, 47-50); that he was denied due process because his trial was unfair (Pet. Br. V, 60-65). Consequently, neither the Illinois Supreme Court nor the Appellate Court of Illinois ruled upon these claims (Pet. for Cert. 1a-21a).

In determining Supreme Court jurisdiction over issues in appeals from state courts, this Court has held that it is the obligation of each state to prescribe the jurisdiction of its appellate courts as to local, state and federal issues. *John* v. *Paullin,* 231 U.S. 583, 585 (1913). Illinois has determined that points not argued in an appellant's brief in the reviewing court are waived. Illinois Supreme Court Rules 341(e)(7), 617(j), Ill. Rev. Stats., ch. 110A, § 341(e)(7), 612(j) (1977). When a litigant has raised an issue for the first time in this Court despite a state rule providing

that issues not raised in appellant's briefs are waived, this Court has refused to review the improperly presented claim. *Beck* v. *Washington,* 369 U.S. 541, 549-553 (1962); *Lawn* v. *United States,* 355 U.S. 339, 362-3, n.16 (1957)

Additionally, petitioner's arguments that the due process and equal protection clause of the Fourteenth Amendment provide a right to counsel distinct and separate from the Sixth Amendment right were not raised by him in the Petition for Writ of Certiorari. In that petition, only two issues were raised: the application of the Sixth Amendment right to counsel to defendants charged with offenses punishable by imprisonment (Pet. for Cert., 9-12) and the validity of the predictive evaluation technique mandated by *Argersinger* (Pet. for Cert., 12-14). This Court granted certiorari on a petition which tendered only those questions. Contrary to the Supreme Court Rules, however, petitioner now attempts to present additional questions for this Court's consideration. Supreme Court Rule 23(1)(c); Supreme Court Rule 40(1)(d)(2). Respondent submits that the additional questions presented are not properly before this Court and should not be considered. *Irvine* v. *California,* 347 U.S. 128, 129 (1954); *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 428-9 (1963); *Neely* v. *Eby Construction Co.,* 386 U.S. 317, 330 (1966); *Dorszynski* v. *United States,* 418 U.S. 428, 431 n.7 (1974).

B.

Due Process Does Not Require Appointment Of Counsel For Non-Felony Cases Where No Imprisonment Is Imposed.

The Sixth Amendment enumerates a specific right to counsel which applies in criminal proceedings. This right is made applicable to the states through the Fourteenth Amendment; in that context, due process of law of the Fourteenth Amendment acts as a conduit for the Sixth

Amendment right to be applied to the states. Petitioner argues that the Due Process Clause of the Fourteenth Amendment provides a right to counsel which is distinct and separate from the Sixth Amendment right. He cites no authority, however, for this proposition: indeed, there is no support for it either in the Constitution or in the precedents of this Court. To contend that the right to counsel in criminal proceedings exists in the Fourtenth Amendment independently of what is provided in the Sixth Amendment is to disregard precedent and to make the Constitution redundant. Thus, the question of whether there is a federal constitutional right to counsel at the state level in non-felony cases not punished by imprisonment must be evaluated in the context of Sixth Amendment concerns.

The requirements of due process are, of course, applicable to both criminal and civil proceedings. In the criminal context, the question of due process involves determination of whether fair procedure requires assistance of counsel. Application of the due process analysis in the criminal context is illustrated by this Court's decision in *Ross* v. *Moffitt, supra,* where the Court examined the state practice of not appointing counsel for indigents in discretionary appeals to determine if such procedure was consistent with the requirements of fair procedure guaranteed by the Due Process Clause. The Court found that counsel was not required because individuals could obtain a fair discretionary appeal without an attorney.

Similar analysis in the context of trial court proceedings in non-felony cases shows that individuals can obtain a fair trial without an attorney. The simple nature of the issues, the *de minimus* nature of the sanctions once imprisonment is removed as a possibility, and the relaxing of the adversarial process combine to permit an individual to make a defense and obtain a fair hearing without an attorney.

The instant case illustrates the reliability and fairness of a trial without an attorney. This is a simple case, presenting a very simple issue. The trial court was not faced with complex or difficult issues, but rather with a case in which the issue was one of credibility of witnesses. The testimony at the trial required that the judge believe either that petitioner was apprehended outside the store with a briefcase which he had not paid for (as the store detective testified) or that petitioner was still in the store looking for the salesgirl when he was stopped (as petitioner testified). Addition of an attorney may have added greater detail to the description of what the store detective observed (if the attorney had cross-examined the detective) but basically, there was no complex defense which needed presentation, nor special theory of defense which needed elaboration and development. It was a completely straightforward case to which the addition of a lawyer perhaps may have added cohesion and eloquence. That there was no defense lawyer, however, did not detract from the reliability of the proceedings.

Analysis of the instant facts by application of the standards set forth by Mr. Justice Powell in *Argersinger* v. *Hamlin*, 407 U.S. 64 confirms the conclusion that due process did not require appointment of counsel in this case. Mr. Justice Powell suggested that relevant factors to be considered included the complexity of the offense charged, the probable sentence which will result upon conviction, and individual factors peculiar to each case. This case was neither complex, nor was petitioner incompetent to present it. Petitioner admits both that there was nothing unusually difficult in this case and that he was not incompetent to present it (Pet. Br. 64). Nor does the sentence imposed require a different result: the actual penalty imposed was a small $50.00 fine which was paid immediately out of petitioner's bond. No additional factors have been suggested which would require appointment of counsel in this case. Indeed, the unfortunate lack of moral condemnation by society for offenses such as shoplifting supports the conclusion that due process did not require that petitioner have counsel appointed for him for this trial.

Finally, if by analogy this Court wishes to consider the right to appointed counsel according to the standards of the civil due process cases, the result of such analysis leads to the same conclusion. The purpose of the approaches adopted in the civil due process cases is to insure fairness in proceedings between the State and individuals. To do so, the Court has found it necessary to consider and balance three distinct factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal administrative burdens that the additional or substitute procedural requirements would entail." *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

In applying these factors to the instant case it is clear that an individual has a significant interest in not being convicted when he is not guilty. However, the procedures involved in a criminal trial provide various safeguards: witnesses must testify against defendant, the defendant is presumed innocent and must be proven guilty beyond a reasonable doubt. The addition of a lawyer to these safeguards will not significantly add to the fairness and reliabilty of the proceedings. (See *supra*, pp 22-23). In light of the fact that the probable value of the proposed additional safeguard is minimal, while the costs which it would impose on society and on defendants who are presently entitled to

counsel under the Sixth Amendment are high (see *supra*, pp. 25-37), the conclusion is inevitable—whether under the tests of civil due process or criminal due process—that appointment of an attorney was not required in petitioner's shoplifting trial and is not required in non-felony trials which do not lead to imprisonment.

CONCLUSION

For the foregoing reasons respondent respectfully requests that the judgment and opinion of the Supreme Court of Illinois affirming the conviction of petitioner by the Circuit Court of Cook County, Illinois be affirmed.

Respectfully submitted,

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APPENDIX A

State	Offenses to which right to appointed counsel applies	Statute or Rule	State Court Decision	Comments
Alabama	Any criminal proceeding in which representation by counsel constitutionally required.	Ala. Code, Title 15 § 15-12-1, § 15-12-20 (1975)		
Alaska	Any offense punishable by incarceration; or which may result in loss of liberty or a heavy fine.	Alaska Stat. § 18.85.100(a) (1974); Alaska Const., art. 1, § 11		"Authorized imprisonment" standard.*

* "Authorized Imprisonment" is used to describe statutory schemes which require appointment of counsel wherever imprisonment is an authorized penalty.

Arizona	Any criminal proceedings which may result in punishment by loss of liberty; or where the court concludes that the interest of justice so requires.	Ariz. R. Crim. P. Rule 6.1(b) (Supp. 1977)	*Burrage* v. *Superior Court*, 105 Ariz. 53, 459 P. 2d 313 (1969)	Court in *Burrage* held that appointment of counsel required in all cases punishable by more than 6 months imprisonment and/or $500 fine, and may be provided if complexity of case requires it.
Arkansas	All criminal offenses except in misdemeanor cases where court determines that under no circumstances will conviction result in imprisonment.	Ark. R. Crim. P. Rule 8.2 (1977)	*Alexander* v. *State*, 527 S.W. 927 (Supr. Ct., 1975)	"Imprisonment-in-fact" standard.**

A2

** Imprisonment-in-fact" is used to describe statutory schemes which, in accord with *Argersinger*, prohibit imposition of imprisonment unless counsel is appointed.

California	All felonies and misdemeanors.	Cal. Const., art. 1, § 13; Cal. Penal Code; § 987 (Supp. 1977)		"Authorized imprisonment" standard.
Colorado	All misdemeanors; also municipal code violations at discretion of public defender.	Col. Rev. Stat. Ann. § 21-1-103 (1974)		No provision made for appointment of counsel for "petty offenses" (punishable by up to 6 months imprisonment) other than municipal code violations.
Connecticut	In all criminal actions, including motor vehicle actions, punishable by confinement for more than 30 days.	Conn. Gen. Stat. Ann. § 51-296 (Supp. 1978); § 845A of Practice Book of Criminal Procedure in the Circuit Court		

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Delaware	In every case which the law requires or where court deems it appropriate.	**Del. Code, Title** 11, § 5103 (1975); Superior Court Crim. R. 44(a) (Supp. 1977)	*Lindh* v. *O'Hara* 325 A. 2d 84 (Del. Supr. Ct. 1974)	"Imprisonment - in - fact" standard.
Florida	Any misdemeanor or municipal ordinance violation unless prior written statement by judge that conviction will not result in imprisonment.	Fla. R. Crim. P., 3.111(b) (1975)	*Rollins* v. *State,* 299 So. 2d 586 (1974)	"Imprisonment - in - fact" standard.
Georgia	Any violation of a state law or local ordinance which may result in incarceration.	Ga. Code Ann., § 27-3203 (1978)	*Johnston* v. *State,* 236 Ga. 370, 223 S.E. 2d 808 (1976)	"Imprisonment - in - fact" standard.

Hawaii	For any offense punishable by imprisonment for more than sixty days or where offense punishable by confinement in jail.	Haw. Const., Art. 1, § 13; Haw. Rev. Stat., Title 37, § 802-1 (1976)		
Idaho	For offenses punishable by confinement of more than six months or fine of more than $300.	Idaho Code Ann., Title 19, § 851 (1978)	*Mahler* v. *Birnbaum,* 95 Idaho 14, 501 P. 2d 282 (1972)	"Imprisonment - in - fact" standard.
Indiana	All criminal prosecutions.	Ind. Const., Art. I, § 13	*Bolkovac* v. *State of Indiana,* 229 Ind. 294, 98 N.E. 2d 250 (1951)	
Iowa	For misdemeanors punishable by imprisonment of more than 30 days or a fine of $100.00; or where defendant faces possibility of actual imprisonment.		Iowa Code Ann., § 813.2, Rule 2 § 3; § 813.3, Rule 42 § 3 (1978 Spec. Pamphlet)	"Imprisonment - in - fact" standard.

Kansas	For all felonies or where imprisonment actually imposed.	Kan. Gen. Stat., § 22-4503 (1974)	*State* v. *Giddings*, 216 Kan. 14, 531 P. 2d 445 (1975)	Although statutory provisions require appointment of counsel for felonies only, caselaw adopts "imprisonment-in-fact" standard.
Kentucky	Offenses punishable by a fine of more than $500 or by confinement.	Ky. Rev. Stat., R. Cr. 8.04 (1978)	*Jenkins* v. *Commonwealth*, 491 S.W. 2d 636 (1973)	
Louisiana	Offenses punishable by imprisonment.	L.S.A.C. Crim. Pr., Art. 513 (Supp. 1978)	*State* v. *Coody*, 275 S. 2d 773 (Supr. Ct. 1973)	

Maine	Any offense punishable by imprisonment for one year or more; where authorized imprisonment is less than one year, the court may assign counsel (but, see Comment).	Maine R. Crim. P. 44, 14 M.R.S.A. (Supp. 1978); 17-A M.R.S.A. § 4-A (3)(E) (Supp. 1978)	*Newell* v. *State*, 277 A. 2d 731 (Maine, 1971)	"Imprisonment-in-fact" standard, although the relevant statutes provide the standard given; *Newell*, however, provides that counsel shall be appointed for offenses where penalty is greater than six months and/or $500.
Maryland	Any criminal proceeding punishable by more than three months confinement or more than $500 fine; or where complexity of the case or characteristics of the accused require counsel; or where constitutionally required.	Md. Ann. Code, art. 27A, § 2(h), § 4 (1976)		"Imprisonment-in-fact" standard.

Massachusetts	Any crime for which sentence of imprisonment may be imposed.	Mass. Supr. Jud. Ct. Gen. R. 3, 10	*MacDonnel* v. *Commonwealth*, 230 N.E. 2d 821 (1971)	*MacDonnell* required right to counsel based upon Rule 3.10 rather than constitutional grounds.
Michigan	Any offense for which imprisonment is imposed.		*People* v. *Studebaker*, 387 Mich. 698, 199 N.W. 2d 177 (July 26, 1972)	"Imprisonment-in-fact" standard.
Minnesota	Any misdemeanor for which a sentence of more than 90 days imprisonment or $500 fine may be imposed.	Minn. Stat. Ann. § 609.02, § 611.07 (Supp. 1977)		"Imprisonment-in-fact" standard.
Mississippi	Any offense punishable by incarceration for 90 days or more.	Miss. Code Ann. § 99-15-15 (1972)	*Nelson* v. *Tullos*, 323 So. 2d 539 (Supr. Ct. 1975)	"Imprisonment-in-fact" standard.

Missouri	Statutory provision for felonies only: Attorney General Opinion No. 207, Young 6-21-63, however, states that counsel should be appointed in misdemeanor cases of "more than minor significance" and "where prejudice might result."	Mo. Ann. Stat., § 545.820 (1953); Mo. Ann. Rules, Crim. Pro. L. 29.01 (1975)	*State ex rel. Kansas City* v. *Meyers*, 513 S.W. 2d 414 (Supr. Ct. 1974)	
Montana	For misdemeanors the court "in the interest of justice" may assign counsel.	Mont Rev. Codes Ann. § 95-1001 (1969)		
Nebraska	In felonies or in any case where imprisonment imposed.	S. 29-1804.06, R.S. Supp. 1972	*Kovarik* v. *County of Banner*, 224 N.W. 2d 761 (Supr. Ct. 1975)	Although statutory provision for felonies only, *Kovarik* recognizes "Imprisonment-in-fact" standard.

Nevada	Any "public offense" where court determines representation required.	Nev. Rev. Stat., § 171.188 (1973)		Statutes do not define "public offense."
New Hampshire	All offenses punishable by imprisonment.	N.H. Rev. Stat. Ann. § 604-A:2, § 625:9 (1974)		"Imprisonment-in-law" standard.
New Jersey	By statute in any offense which is indictable.	N.J. Stat. Ann. § 2A:158(A) (Supp. 1973); N.J. Crim. Rules 3:27-1 (1973)	*Rodriguez* v. *Rosenblatt*, 58 N.J. 281, 277 A. 2d 216 (1971); *State* v. *McGrew*, 127 N.J. Super. 327, 317 A. 2d 390 (1974)	In *Rodriguez* court held counsel should be assigned where imprisonment actually imposed or where other consequences of magnitude actually threatened. In *McGrew*, (appellate) court notes rule of *Rodriguez* is not of constitutional dimension but rather a kind of policy ruling.

New Mexico	Any offense that carries a possible sentence of imprisonment.	N.Mex. Stat. Ann., § 41-22A-12 (Supp. 1975)		"Imprisonment-in-fact" standard.
New York	Any offenses except traffic infractions.	C.P.L. § 170.10 (1971)		
North Carolina	Any case in which "imprisonment, or a fine of $500.00 or more" is likely to be adjudged.	N.C. Gen. Stat., § 7A-451 (Supp. 1975)		
North Dakota	All non-felony cases unless magistrate determines that sentence upon conviction will not include imprisonment.	N.D. Cent. Code R. Cr. Pr., Rule 44 (1974)	*State* v. *Heasley*, 180 N.E. 2d 242 (1970)	In *Heasley*, county judge authorized to appoint counsel in misdemeanor cases. Rule 44 enacted 'imprisonment-in-fact" standard.
Ohio	Offenses punishable by less than six months imprisonment unless no confinement imposed.	Ohio R. Crim. P., Rule 2, Rule 44(A)(B), (1975)		"Imprisonment-in-fact" standard.

Oklahoma	In all criminal cases.	Okla, Stat. Ann. 22-464, 1271 (1969)	*Stewart* v. *State*, 495 P. 2d 834 (Crim. App. 1972)	
Oregon	In all criminal cases.		*Brown* v. *Multnomah County Distr. Ct.*, 29 Or. App. 917, 566 P. 2d 522 (1977)	
Pennsylvania	In all misdemeanors and felonies; in other cases where there is "a likelihood that imprisonment will be imposed."	Pa. R. Cr. P. 316(a)-(c) (supp. 1978)		"Imprisonment-in-fact" standard for "summary cases"; see Comment to Rule 316 indicating intent of rule to implement *Argersinger*.

Rhode Island	Offenses punishable by imprisonment of more than 6 months and/or fines over $500.	Supr. R. Cr. Pr. 44; R. Cr. P. 44 (1976)	*State* v. *Halliday*, 280 A. 2d 333 (Supr. Ct. 1971)	Note to Cr. R. 44, indicates intent of Rule to implement *Halliday* which held that appointed counsel required in all cases punishable by more than six months imprisonment or $500 fine.
South Carolina	Code provides for counsel wherever guaranteed by the Constitution.	S.C. Code § 17-3-10 (1977)		
South Dakota	In any criminal action.	S.D. Comp. Laws Ann. § 23-2-1 (Supp. 1977)	*In re Wright*, 86 S.D. 589, 199 N.W. 2d 599 (1972), reversing 85 S.D. 669, 189 N.W. 2d 447 (1971) (remand for reconsideration in light of *Argersinger*)	In *Wright*, the court granted petitioner relief from his sentence of 30 days imprisonment stemming from an uncounseled conviction.

Tennessee	Every person accused of any crime or misdemeanor whatsoever.	Tenn. Code, Ann. § 40-2002-3 (1975)		Tenn. Code Ann. § 40-2017 provides for appointment of public defender or appointed attorney in all felony cases only.
Texas	Any felony or misdemeanor punishable by imprisonment.	Tex. Code Cr. Pr. Art 26.04 (1965)	*Aldrighetti* v. *State*, 507 S.W. 2d 770 (Crim. App.) (1974); *Trevino* v. *State*, 555 S.W. 2d 750 (Crim. App. 1977)	Neither statute or case-law makes clear if standard is "authorized imprisonment" or "Imprisonment-in-fact"; cases cited involve situations where jail time actually imposed.
Utah	Any crime in which penalty of more than six months imprisonment could be imposed.	Utah Code Ann., § 77-64-2 (Supp. 1977)	*Salt Lake City Corp.* v. *Salt Lake County*, 520 P. 2d 211 (Supr. Ct. 1974	

Vermont	Any misdemeanor punishable by any period of imprisonment or fine over $1000 unless prior determination that imprisonment or fine over $1000 will not be imposed.	Ver. Stat. Ann., § 13-5201 - 5231 (1974)		"Imprisonment - in - fact" standard.
Virginia	Misdemeanors, the penalty for which may be confinement in jail.	Va. Code Ann., § 19.2-157, 160 (Supp. 1978)	*Whorley* v. *Commonwealth*, 214 S.E. 2d 447 (Supr. Ct. 1975)	
Washington	All [illegible]nal offenses punish[illegible]by loss of liberty.	J. Cr. R. 2.11(a)(1)	*McInturf* v. *Horton*, 540 P. 2d 421 (Supr. Ct. 1975)	"Authorized imprisonment" standard.

West Virginia	All misdemeanor cases.	W.Va. Code Ann., § 62-3-1(a) (1977)		
Wisconsin	In all criminal prosecutions.	Const., Art. I, § 7	*State ex rel. Winnie Harris*, 75 Wisc. 2nd 547, 249 N.W. 2d 791 (1977)	"Authorized imprisonment" standard.
Wyoming	In all criminal cases wherein accused shall or may be punished by imprisonment in the penitentiary.	Wyo. Stat. Ann., § 7-9-105 (1977)		

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1177

AUBREY SCOTT,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

REPLY BRIEF FOR THE PETITIONER

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RESPONDENT'S MISSTATEMENTS OF FACT

Respondent makes two misstatements of fact. First, on page six of its brief, Respondent states that Petitioner testified he would not pay for the briefcase after he was accused of theft. The Report of the Trial Proceedings, however, contains no such statement. Second, on page three of its brief Respondent omits from its statement of the Sixth Amendment to the United States Constitution the right "to have the Assistance of Counsel for his defense."

ARGUMENT

I.

RESPONDENT'S ARGUMENT THAT COUNSEL IS UNNECESSARY FOR FAIRNESS IN MISDEMEANOR TRIALS THAT DO NOT RESULT IN IMPRISONMENT IS CONTRARY TO FACT AND PRECEDENT AND IS IRRELEVANT IN LIGHT OF THE COURT'S INCORPORATION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL IN THE FOURTEENTH AMENDMENT.

Respondent's brief has crystallized an issue that is at the heart of this case: whether defense counsel is essential to a fair misdemeanor trial. Counsel is not essential, according to Respondent, because a misdemeanor trial is a relaxed non-adversarial fact-finding process in which inexperienced, passive prosecutors hurriedly present simple factual cases without concern for rules of evidence or procedural formalities. (Resp. Br. 22-24). Respondent, however, mistakes desultory fact-finding for fair fact-finding.

This mistake is critical for two reasons. First, accurate fact-finding is no less a goal of a misdemeanor than a felony trial. The purpose and functions of counsel like "the purpose and functions of the jury do not vary significantly with the importance of the crime." *Ballew v. Georgia*, 435 U.S. 223, 240 (1978). The defendant thus has no less need for either counsel or a representative jury in a misdemeanor case "than when the State has chosen to label an offense a felony." *Id.* at 241. (footnote omitted). Similarly, the state's interest is avoiding unfairness in its trials is the same regardless of whether the prosecution is for a misdemeanor or a felony; "our system of the administration of justice suffers when any accused is treated unfairly." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Second, when the formality of the trial process does break down the prosecutor has the ability, as well as the duty within ethical limits, to assure that any such relaxation in the adversary relationship serves the goal of conviction rather than acquittal. The prosecutor in the trial below recognized this duty when he refused the judge's request to clarify the facts by asking the defendant more questions. (App.9). In making the judgment that the State had already made its case (App.9), so that further detail was not warranted, the prosecutor was motivated by a duty to try to convict, not a duty to try to clarify the facts.

Respondent's notion that in a misdemeanor trial that does not result in imprisonment the court and prosecutor should have free rein to ignore the procedural formalities of the criminal trial process is belied not only by the functional need for those formalities to safeguard the integrity of the fact-finding process, but also by Illinois law and opinions of the Court. Illinois law[1] leaves no doubt that misdemeanor

[1] No Illinois authority supports the proposition that the procedural requisites for the conduct of a misdemeanor trial that does not result in imprisonment are any less rigorous than they are for a felony trial or for a misdemeanor trial that results in imprisonment. Rather, Illinois courts have held, on the basis of trial records similar to that in the instant case, that the inability of misdemeanor defendants to represent themselves adequately requires reversal of their convictions because of their trials' unfairness. *People v. Eickelman*, 32 Ill. App. 3d 665, 668, 336 N.E.2d 61, 63-64 (1975); *People v. Chilikas*, 128 Ill. App. 2d 414, 417-419, 262 N.E.2d 732, 735 (1970). What the Florida Court of Appeals recently said about defending misdemeanor trials in its State is equally true in Illinois: "There are no 'simple' criminal defense representations, and those that seem so are merely not understood." *Brooks v. State*, 336 So. 2d 647, 651 (Fla. App. 1976). Even Respondent recognizes this fact in observing that in rural areas "the scarcity of qualified attorneys pose(s) great difficulties in propcuring effective representation for indigents" and that the number of qualified attorneys has apparently not increased. (Resp. Br. 35-36). If significant numbers of attorneys are not qualified to provide defense representation in misdemeanor trials, then what quality representation is to be expected of *pro se* defendants?

trials are bound by all of the "invariable attributes" of the criminal trial process, *Gagnon v. Scarpelli*, 411 U.S. 778, 789 (1973), the adversary nature of which necessitates the Sixth Amendment right to counsel. *Middendorf v. Henry*, 425 U.S. 25, 40 (1976). Moreover, the assembly-line processing of the misdemeanor defendant, which Respondent now advocates as the model of fairness, is exactly what the Court condemned in *Argersinger v. Hamlin*, 407 U.S. 25, 32-36 (1972), as being both inherently unfair and highly prejudicial to the unrepresented defendant's chances for acquittal.[2] Respondent, indeed, stands *Argersinger* on its head by, on the one hand, ignoring its analysis of the necessity of defense counsel for a fair misdemeanor trial and, on the other hand, citing it for limiting the right to counsel to where loss of liberty is involved (Resp. Br. 14), a holding the Court expressly refused to make. 407 U.S. at 37. Respondent's constricted interpretation of the meaning of *Argersinger* is also nonsensical, for a misdemeanor trial without counsel that must be reversed because it is fundamentally unfair if the defendant is sentenced to jail does not suddenly become fundamentally fair if the defendant is only fined.

Once the immutable adversary character of American misdemeanor trials is recognized, Respondent's argument that counsel is of only marginal benefit to misdemeanor defendants cannot be reconciled with the Court's consistently repeated conclusion that "[i]n an adversary system of criminal justice, there is no right

[2] The unacceptable consequence of Respondent's non-adversarial theory of misdemeanor trials is most clearly demonstrated in its factually erroneous and legally nihilistic claim that, even when granted the right to counsel, a defendant's other Sixth Amendment rights are meaningless "in the context of the reality of the over-crowded misdemeanor courts described." (Resp. Br. 24).

more essential than the right to the assistance of counsel." *Lakeside v. Oregon*, 435 U.S. 333, 341 (1978). Respondent's error, however, is not only the factual one of discounting the critical role of defense counsel in a misdemeanor trial. It is also the legal one of defining the determinative issue in this case as whether or not the governmental cost of providing counsel outweighs the relative benefit to defendant of having the assistance of counsel. The Court precluded exactly such weighing of the marginal utility of counsel in promoting fairness at trial when it held in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that the Sixth Amendment right to counsel was fundamental to fairness and therefore must be incorporated in the Fourteenth Amendment. *Cf. Herring v. New York*, 422 U.S. 853, 867-68 (1975) (Rehnquist, J., dissenting). As the Court recognized in *Argersinger*, the Sixth Amendment rights incorporated in the Fourteenth Amendment define the scope of their own application: "The Sixth Amendment, which in enumerated situations has been made applicable to the States by reason of the Fourteenth Amendment . . . provides specified standards for 'all criminal prosecutions.'" 407 U.S. at 27 (citations omitted). Thus, when a trial court finds that a defendant faces a "criminal prosecution," it has no discretion to question whether or not the assistance of counsel is essential for a fair trial in that case; after *Gideon* the Framers' determination that counsel is essential "in all criminal prosecutions" is binding upon the states.

Respondent argues neither that Petitioner's misdemeanor-theft prosecution is anything other than "criminal" (*see* Pet. Br. 16-18), nor that the Court should retreat from *Gideon's* incorporation of the Sixth Amendment right to counsel in the Fourteenth Amendment. Instead, Respondent argues that the Sixth Amendment

right to counsel need not be applied literally "in all criminal prosecutions" because it should be analogized to the right to jury trial, which the Court has refused to apply to prosecutions for crimes punishable by less than six months imprisonment. (Resp. Br. 10-13). The Court, however, disapproved this very argument in *Argersinger*: "We reject, therefore, the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer." 407 U.S. at 30-31.

Respondent, nevertheless, asserts that the right to counsel and the right to jury trial should be distinguished from all the other Sixth Amendment rights, which have thus far been applied without regard to the seriousness of the offense, because only the rights to counsel and jury are costly. Although this is a dubious proposition in itself,[3] the critical characteristic of the Sixth Amendment rights that have been incorporated in the Fourteenth Amendment is that all of them, except the right to a jury, are deemed essential to a fair trial. Compare *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1973), with cases cited in *Argersinger v. Hamlin*, 407 U.S. at 28. *See also Fuller v. Oregon*, 417 U.S. 40, 52 (1974) (right to counsel necessary to recognize and take advantage of the other procedural and substantive fair trial safeguards). Moreover, unlike all other Sixth Amendment rights, the

[3] The cost of providing sufficient judges, prosecutors and courtrooms to assure defendants speedy trials is obviously considerable. Although the State could also save substantial time and expense if it did not have to confront the defendant with the witnesses against him, such cost-saving has never been a factor in deciding the application of the Sixth Amendment right to confrontation. *See Pointer v. Texas*, 380 U.S. 400 (1965). The commentator whom Respondent cites in support of a distinction between the rights to counsel and jury and all other Sixth Amendment rights on the basis of the former's cost of implementation emphatically rejects the use of such distinction in order to apply the right to counsel more narrowly than the non-jury Sixth Amendment rights. J. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 *Wash. L. Rev.* 685, 708 (1968).

Court has found historical reasons for limiting the right to jury trial to a narrower compass than that specified by the terms of the Sixth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968). Exactly the opposite is the case with the right to counsel, for "there is nothing in the language of the Amendment, its history, or in the decisions of this Court, to indicate that it was intended to embody a retraction of the right in petty offenses wherein the common law previously did require that counsel be provided." *Argersinger v. Hamlin*, 407 U.S. at 30.

Finally, even if Respondent's jury trial analogy were to be accepted, reversal of Petitioner's conviction would still be required. The Court's jury trial cases make clear that the relevant criterion for distinguishing between serious and petty offenses is the penalty authorized by law, not the penalty actually imposed. *Duncan v. Louisiana*, 391 U.S. 145, 162 n.35 (1968); *Baldwin v. New York*, 399 U.S. 66, 68-70 (1970). Since the authorized penalty for misdemeanor theft in Illinois was a maximum one year's imprisonment, Ill. Rev. Stat. ch. 38, § 16-1 (1969), Petitioner was tried for what the Court has classified as a serious offense under the standard adopted in *Baldwin*, 399 U.S. at 69.

Respondent's argument that prosecutions for even such serious offenses do not warrant the right to counsel fails on three grounds. First, it makes the Sixth Amendment's explicit application "in all criminal prosecutions" totally meaningless. Second, it makes the application of *Gideon's* holding that counsel is an essential element of fundamental fairness contingent upon whether or not a particular state has classified an offense as a felony, rather than upon whether or not the offense charged is serious enough to warrant the constitutional requisites of a fair trial. The Court has previously rejected the arbitrary formalism of making

constitutional rights depend upon a particular state's classification of offenses as misdemeanors or felonies. *Ballew v. Georgia*, 435 U.S. 223, 240 (1978); *cf. Patterson v. Warden*, 372 U.S. 776 (1963). Third, it effectively nullifies the right to jury trial. Although Respondent asserts that a layman can adequately try a misdemeanor case to a jury (Resp. Br. 24-25), Respondent does not explain how laymen can be expected to perform adequately the tasks that are critical in trying any criminal case to a jury, such as, jury *voir dire*, making an opening statement, objecting to incompetent evidence, making a closing argument, proposing jury instructions and arguing the post-trial motions necessary to preserve error for appeal. Competency in these crucial functions is not always found in practicing criminal defense attorneys; to expect if from laymen is unrealistic.

In summary, Respondent has offered no rationale and no precedent to controvert the logic of Petitioner's alternative Sixth Amendment arguments: first, that the Sixth Amendment, as incorporated in the Fourteenth Amendment, applies by its own terms "in all criminal prosecutions" and therefore in all prosecutions for misdemeanors in which imprisonment is authorized; and second, that regardless of whether the Sixth Amendment's terms are to be applied literally, the right to counsel is as fundamental to fairness in a misdemeanor trial that does not result in imprisonment as it is in a felony trial or in a misdemeanor trial that does result in imprisonment. Moreover, even if there could be some doubt after *Gideon* and *Argersinger* as to whether an indigent misdemeanor defendant's right to appointed counsel at trial is fundamental to fairness, there can be no doubt, and none is suggested by Respondent, that the Sixth Amendment was violated by the trial court's failure to notify Petitioner that he had a right to be represented by his own counsel at his own expense. (*See* Pet. Br. 20-21).

II.

PETITIONER RAISED THE QUESTIONS OF THE DENIAL OF HIS RIGHT TO DUE PROCESS, EQUAL PROTECTION AND A FAIR TRIAL BOTH IN THE ILLINOIS COURTS BELOW AND IN HIS PETITION FOR CERTIORARI. THESE QUESTIONS ARE THEREFORE NOT WAIVED.

Since Petitioner argued repeatedly in his state appellate court briefs that he was denied due process, equal protection and a fair trial it is frivolous for Respondent to contend that Petitioner waived those claims in this Court. Thus, Petitioner stated in his Illinois Appellate Court brief; "The Record clearly shows that Scott did not receive a fair trial." (p.15). In his Illinois Supreme Court brief Petitioner states: "Given the Report of Proceedings in both Scotts' and Harris'[4] trials, there can thus be no question that they did not receive fair trials and that the unfairness is directly attributable to the absence of defense counsel." (p.12).

With respect to Petitioner's due process and equal protection claims, he stated in his appellate court brief: "The constitutional mandates of equal protection and due process require an objective standard for appointment of counsel." (p. 18). Petitioner's due process and equal protection claims were addressed explicitly by both Respondent, Brief in the Appellate Court of Illinois, 14-18, and the Illinois Appellate Court. Appendix to Petition for Certiorari, 14a-15a, 36 Ill. App.3d 304, 310, 343 N.E.2d 517, 522, Petitioner also presented these issues to the Illinois Supreme Court. In his Petition For

[4] The appeal in *People v. Harris* was consolidated with the instant case in the Illinois Supreme Court. Harris was tried for five misdemeanor traffic violations without being notified of her right to counsel or jury trial. She was fined for three violations and sentenced to three days in County Jail for one violation, for which she served one day in jail. The State confessed error because of the failure to advise Harris of the right to jury trial.

Appeal As A Matter Of Right Or In the Alternative For Leave To Appeal, Petitioner argued that "inequities and further due process violations" would follow from the determination of the right to counsel on the basis of a pre-trial prediction of sentence. (p. 17). In his Illinois Supreme Court brief on the merits, Petitioner argued that, "inequalities, inefficiencies and arbitrary judicial decision-making," would result from such a predictive determination of the right to counsel. (p. 16). Moreover, Respondent has previously recognized that Petitioner has raised a Fourteenth Amendment argument that is distinct from his Sixth Amendment argument since Respondent argued in both his brief to the Illinois Supreme Court (p. 26) and in his Brief in Opposition to the Petition for Certiorari filed in this Court (p. 12) that the predictive sentencing determination procedure by which misdemeanor defendants can be denied the right to counsel is not a violation of the Fourteenth Amendment.

Pursuant to Illinois Supreme Court Rules 341(e)(7), 612(j), Ill. Rev. Stat. ch. 110A, § 341(e)(7), 612(j) (1977), Illinois courts will find issues raised for consideration on appeal even if they are "buried within the confines of . . . [the] argument." *Department of Conservation v. First National Bank*, 36 Ill. App. 3d 495, 505, 344 N.E.2d 11, 19 (1976). Since, as Respondent recognizes, Illinois law governs the question of whether issues have been properly preserved for consideration by the State's appellate courts, there can be no doubt that Petitioner's explicit discussion of the denial of due process, equal protection and a fair trial in the Illinois courts below preserves those questions for consideration by this Court.

Respondent bases its argument that the Petition for Certiorari did not raise a Fourteenth Amendment claim independent of a Sixth Amendment claim (Resp. Br. 42), entirely upon its change in the substance of the question presented in the Petition. Contrary to Respondent's brief, the question presented was not whether "the Sixth Amendment as applied to the States by the Fourteenth" guarantees the right to counsel. (Resp. Br. 2) Rather, the Court accepted certiorari on the question of "whether the Sixth *and* Fourteenth Amendments" guarantee the right to counsel. (Petition for Certiorari, 2) (emphasis added). Since the Court under Supreme Court Rule 23(1)(c) will consider questions fairly comprised within the questions set forth in the Petition, it was unnecessary for Petitioner to set forth the actual contents of either the Sixth or the Fourteenth Amendments as questions presented for review. By specifying the numerical designation of the Amendments relied upon, rather than quoting their contents, Petitioner also avoided the "unnecessary detail" proscribed in Supreme Court Rule 23(1)(c). Moreover, such designation is more definite than the general reference to unconstitutionality that the Court has previously found acceptable. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 98-99 (1976); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (*cert. question at* 45 U.S.L.W. 3299) (U.S. Oct. 19, 1976).

III.

RESPONDENT'S ARGUMENT THAT MISDEMEANOR DEFENDANTS WHO ARE ONLY FINED ARE PROTECTED BY NEITHER THE SIXTH NOR THE FOURTEENTH AMENDMENT CONTRADICTS PRECEDENT AND NULLIFIES THE SUPREMACY CLAUSE. RESPONDENT'S ALTERNATIVE ARGUMENT THAT THE COST OF PROVIDING COUNSEL OUTWEIGHS DEFENDANT'S INTEREST IN COUNSEL IS IRRELEVANT AS A MATTER OF LAW AND ERRONEOUS AS A MATTER OF FACT.

Since Respondent recognizes, as it must, that misdemeanor trials are criminal proceedings (Resp. Br. 43), Respondent's declaration that "[t]he Sixth Amendment enumerates a specific right to counsel which applies in criminal proceedings" (Resp. Br. 42) contradicts the argument in Part I of Respondent's brief that the Sixth Amendment right to counsel does not apply to misdemeanor trials not resulting in imprisonment. If Respondent did not intend to concede the Sixth Amendment issue in this fashion, the only alternative rationale for its argument that neither the Sixth nor the Fourteenth Amendment applies to Petitioner's case is that a misdemeanor trial not resulting in imprisonment is neither a true criminal proceeding to which the Sixth Amendment applies nor a true civil proceeding to which procedural due process applies. It would instead be depicted as some form of pseudo-criminal proceeding that is beneath the commands of the Constitution. Acceptance of this theory, however, would be both unprecedented and an evasion of the Supremacy Clause through a definitional abstraction that would hide the substance and the method of Petitioner's deprivation. Regardless of how Illinois chooses to characterize its misdemeanor prosecutions, they are not immune from constitutional scrutiny. If Petitioner's fine-only misdemeanor theft prosecution is a criminal prosecution,

the Sixth Amendment right to counsel applies. If it is not, it still resulted in a governmental deprivation of substantial interests in liberty and property (Pet. Br. 23, 42-46); therefore, the due process requirement of fundamentally fair fact-finding procedures applies.

Under both Sixth Amendment and procedural due process theories of the case, Respondent would have the Court apply a balancing test in order to establish that the governmental cost of providing counsel outweighs the defendant's interest in counsel. Cost is, of course, a necessary consideration for the state in choosing the method used to provide indigent defendants with competent counsel. Cost, however, is not a consideration in determining the state's obligation to provide counsel in order to assure defendants a fair trial. This distinction in the proper role of governmental cost considerations under the Sixth Amendment was recently emphasized in *Bounds v. Smith*, 430 U.S. 817 (1977), where the Court pointed out that the fact that the state must shoulder affirmative obligations to provide prisoners with meaningful access to the courts, including paying lawyers for indigent defendants at trial, "is not to say that economic factors may not be considered, for example, in choosing the methods used to provide meaningful access." *Id.* at 825. "But," the Court cautioned, "the cost of protecting a constitutional right cannot justify its total denial." *Id.* Therefore, the Court concluded, the inquiry is neither whether alternatives, such as jailhouse lawyers, are available nor whether affirmative state action is required; "the inquiry is rather whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Id.* Similarly, the inquiry in the instant case is not whether

some defendants can be acquitted without counsel nor whether the state must pay for counsel: it is, as in *Gideon* and *Argersinger*, whether counsel is an essential element of a fair criminal trial.

Respondent's balancing test is no more justified under a procedural due process theory of the case. Respondent cites no authority for the proposition that in determining the due process safeguards essential for fair judicial decision-making at trial the Court will balance the need for fair procedures against the governmental cost of providing such procedures. *In re Gault*, 387 U.S. 1 (1967), stands uncontradicted for the proposition stated in Petitioner's brief at 23-24, that in deciding a defendant's due process right to counsel in the context of a criminal-type trial proceeding, the Court will find determinative how necessary counsel is for fairness, not how costly counsel is for the state. Should a balancing test be applied, however, Respondent misconstrues the relevant interests on both sides of the balance.

A. Counsel Is As Necessary To A Fair Trial In A Misdemeanor Prosecution Not Resulting In Imprisonment As It Is In A Felony or Misdemeanor Prosecution Resulting In Imprisonment. Furthermore, A Misdemeanor Defendant Who Is Not Imprisoned Has Sufficient Interest At Stake To Require The Requisites Of A Fair Trial.

As noted above, pp. 2-6, Respondent's contention that counsel is not essential to a fair misdemeanor trial that does not result in imprisonment is contradicted both by Court decisions on the significance of defense counsel for a fair trial and by Illinois law, according to which the trial of a such misdemeanor is no less formal and no less complex than the trial of a felony or a misdemeanor that does result in imprisonment. Moreover, Respondent's claim that in practice many judges and prosecutors tend

to "relax" the procedural formalities in misdemeanor prosecutions that do not result in imprisonment (Resp. Br. 22-23, 43) only emphasizes the defendant's need for counsel to assure that his procedural rights are not "relaxed" out of existence.

Respondent's argument that the deprivation resulting from a fine-only misdemeanor conviction is not sufficiently significant to warrant the safeguard of counsel is illogical. Respondent recognizes that the consequence of such convictions, including disqualification for certain employment, enhancement of subsequent charges and sentences and use for subsequent impeachment, may be significant.[5] (Resp. Br. 17-18). Yet, because these consequences have different actual effects in different cases, Respondent argues that they provide an unworkable standard for determining the right to counsel and so should be disregarded. (Resp. Br. 18). Petitioner, however, rather than advocating such an "actual consequence" standard for determining the right to counsel, has advocated the exact contrary—that the prospect of such consequences in all prosecutions for misdemeanors punishable by imprisonment are sufficiently significant to require those safeguards essential to a fair trial. Providing the right to counsel in all prosecutions for crimes punishable by imprisonment creates a more

[5] Respondent does not address the problem of the aggravated stigma of conviction when a misdemeanor defendant is given a prison sentence that the Court considers "served." (Pet. Br. 43 n.24). However, Respondent's citation of authority that time served is "the usual sentence for shoplifters in Chicago Municipal Court," (Resp. Br. 39 n.34) indicates the pervasiveness of this anomaly in the way courts apply the imprisonment-non-imprisonment criterion for the right to counsel. Because such time-served sentences are directly related to an indigent defendant's inability to afford bond, denying the right to counsel solely because the sentence was served before rather than after trial has serious equal protection implications.

rational and consistently appropriate boundary than the criterion of actual imprisonment advocated by Respondent; for, as the Court found in *Mayer v. City of Chicago*, 404 U.S. 189, 197 (1971), in certain cases imprisonment may have less serious effects than the collateral consequences of a fine-only conviction. Imprisonment is, of course, a most severe sanction that may not be imposed without the safeguards essential to a fair trial; but, Respondent's argument that the stigma to a convicted defendant's good name, the prejudice to his career opportunities and the limitations on his freedom incident to probation and suspended sentence are too insignificant to justify the same fair trial safeguards is callous and contrary to the Court's past recognition of the gravity of such nonimprisonment consequences of criminal and quasi-criminal convictions. (*See* Pet. Br. 42-46).

B. Respondent's Cost Argument Is Purely Speculative, Contrary To Probability and Erroneous in Sacrificing The Requisites Of Fairness To The Claims of Economy.

In both its Fourteenth and Sixth Amendment arguments Respondent relies principally on the contention that extending the right to counsel to Petitioner's circumstances would be too costly for the States to bear. (Resp. Br. 25-37). Respondent, however, neither advances reliable statistical support for its cost argument nor rebuts the argument of Petitioner and Amicus that the cost of such an extension need not be significantly greater than the cost of complying with *Argersinger*. Most important, there is no evidence to show that the sixteen to twenty-one states that have already extended the right to counsel to cases where imprisonment is an authorized penalty have as a result suffered any significant adverse economic impact. Respondent's assertion

that such an extension would impose economic and social costs "simply too great to permit" (Resp. Br. 35, and 25-37 generally) therefore fails the test of experience.[6]

Respondent's attempt to quantify the cost of such an extension also fails the test of reliability because several critical variables are missing from its extrapolations from selected Illinois courts' and public defenders' caseload statistics. Thus, in speculating about the effect of an authorized imprisonment standard in Cook County, Illinois, Respondent compares the public defender's current municipal court caseload with the municipal court's total caseload without indicating what percentage of that total caseload concerns matters that would not be affected by adoption of an authorized imprisonment standard, including felony preliminary hearings, probation violations and offenses having no authorized imprisonment, such as ordinance violations and petty offenses. (Resp. Br. 30-31). In estimating the effect of an authorized imprisonment standard in Brown County, Illinois (Resp. Br. 27-28), Respondent omits the crucial statistic of how many of the forty-six accused misdemeanants in 1976 were in fact represented by counsel. Respondent's assertion that 420 new non-felony cases would have required appointment of counsel in Brown County is based upon its inclusion of 853 traffic and

[6] Not only does Respondent fail to support its contention that increasing defense representation will congest the courts (Resp. Br. 34), but it contradicts such contention by asserting that, according to one study of misdemeanor courts, "even with appointed counsel present, the trials which were conducted were characterized by lack of formal motions, nonexistent cross-examination and quick disposition of cases." (Resp. Br. 23) (footnote omitted). The fact that a majority of such cases are immediately plea bargained (Resp. Br. 23, n. 16) demonstrates that when the defendant as well as the state has counsel an expeditious disposition acceptable to both sides is likely.

thirty-four conservation violations, categories of cases that are not necessarily before the Court in this case. (*See* Pet. Br. 16). When such cases are excluded from Respondent's calculations, only twenty-two new non-felony cases would have required appointment of counsel in 1976 under an authorized imprisonment standard.

Respondent's assertion that in Birmingham, Alabama a tenfold increase in expenditures would be required under an authorized imprisonment standard is similarly misleading. (Resp. Br. 29). Respondent derives this figure from S. Krantz et al., *Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin* (1976) at 361. However, the authors of this study admit that "accurate existing or potential non-felony case statistics are simply not available at either the national or local level." Krantz, at 11. Moreover, the authors make clear that this tenfold estimated increase is "extraordinary only in light of the present low expenditure." *Id.* at 361. Krantz et al. estimate that the present cost of misdemeanor defense representation in Birmingham is twenty dollars per case, while their projected cost under an authorized imprisonment standard would be fifty dollars per case. Assuming, however, no change in per case defense cost, the increase from adopting an authorized imprisonment standard, which would include traffic offenses, would be only fourfold. Even this cost estimate may be too high. According to Respondent's own statistics from the Circuit Court of Cook County, Illinois, in which the defense cost per misdemeanor case is approximately twenty-four dollars, the increase from adopting an authorized imprisonment standard would be twofold. (Resp. Br. 31). Moreover, even this cost estimate may be far too high because it ignores the fact that many misdemeanor defendants waive counsel (Amicus Br. 10) and because it relies on a forty-

seven percent indigency rate for misdemeanants that may be more than four times higher than is warranted.[7]

The absence of reliable statistics is a critical deficiency in Respondent's cost argument because the most logical *a priori* judgment on the cost question would be that the increase in the need for appointed counsel from applying an authorized imprisonment standard would not be great. Presumably, trial courts have generally attempted to respect their legislatures' judgments that imprisonment is an appropriate potential penalty for violation of the criminal laws that authorize such penalty. Indeed, the Supreme Courts of Washington[8] and Wisconsin[9] have found it an improper infringement upon legislative authority for trial courts to eliminate imprisonment as an alternative sentence before trial under any circumstances. Therefore, assuming proper judicial deference to legislative intent, it follows that courts have generally kept the imprisonment option open in the absence of unusual circumstances that make it clear before trial that imprisonment could not be an appropriate sentence. Moreover, as the Court has recently emphasized in *United States v. Grayson*, ... U.S. ....., 98 S.Ct. 2610, 2617 (1978), since rational sentencing cannot be accomplished without the information about the defendant that can be gained only during the trial, most trial courts can be expected to appoint counsel before trial in order to avoid predetermining the sentence on

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[7] The National Conference of Commissioners on Uniform State Laws found that "Because of the much lower cost of counsel for nonfelony cases, it appears that less than 10% of nonfelony defendants meet indigency standards, as opposed to 60-65% of felony defendants." Uniform Rules of Criminal Procedure (Approved Draft 1974) 54.

[8] *McInturf v. Horton*, 85 Wash. 2d 704, 706, 538 P.2d 499, 500 (1975) (quoted at Pet. Br. 32).

[9] *State ex rel. Winnie v. Harris*, 75 Wis. 2d 547, 556, 249 N.W.2d 791, 795-6 (1977) (quoted at Pet. Br. 33).

the basis of arbitrary guess-work.[10] Thus, in the absence of contrary statistical evidence, it may be presumed that trial courts appoint counsel in the great majority of prosecution for misdemeanors punishable by imprisonment because there is no other way to accommodate the holding of *Argersinger* with both their legislatures' intent in authorizing imprisonment and their own desire to perform their sentencing functions rationally.

Even if it were presumed that trial courts were not now granting the right to counsel in the majority of prosecutions for offenses punishable by imprisonment, states can take effective steps to minimize the costs of requiring the right to counsel in such cases. In this regard, Respondent does not dispute the arguments of Petitioner and Amicus that additional costs can be drastically curtailed and possibly eliminated by replacing or supplementing appointed private counsel with public defenders (Amicus Br. 11-13) and by "decriminalization" (elimination of imprisonment as a possible penalty) of the innumerable minor violations for which the deterrent effect of a prison penalty is unnecessary. (Pet. Br. 39; Amicus Br. 4-7).

Respondent argues, however, that the Court cannot properly consider such cost-cutting measures since their implementation is within the sole province of the legislature. (Resp. Br. 33). The fallacy in this argument is that the due process balancing test requires the Court, rather than the legislature, to weigh the interests on both sides of the balance. *E.g. Goldberg v. Kelly*, 397 U S. 254, 265-266 (1970). By foreclosing the Court from

[10] Respondent's argument that prosecutors in misdemeanor courts can help judges "to evaluate cases on a rational basis prior to trial," (Resp. Br. 38) is belied by Respondent's own characterization of such prosecutors as utterly unprepared before trial. (Resp. Br. 22-23).

considering the effect of measures that would enable the state to reduce the cost of fair fact-finding procedures, Respondent would have due process depend upon whatever the state finds most convenient, rather than upon what the Court deems an appropriate balance between the interests of the state in avoiding undue cost and of the individual in being tried fairly.

Moreover, it is noteworthy that Respondent argues that if the state encounters problems in law enforcement because of *Argersinger's* requirement of the right to counsel, "appropriate adjustment suitable to the needs of each particular locality can be made at the local level." (Resp. Br. 20). Similarly, if the state should encounter difficult burdens because the Court now requires counsel in misdemeanor prosecutions where imprisonment is authorized, adjustments, such as decriminalization and statewide public defender systems, may also appropriately be made to lighten or even eliminate the burdens.

In summary, Respondent's argument that extending the right to counsel to Petitioner's category of offense would be so costly that it outweighs the defendant's interest in avoiding an unfair conviction rests upon unreliable cost estimates and is belied by the inferences as to appropriate judicial decision-making that may fairly be drawn from the available evidence. The argument's greatest flaw is that it attempts to measure due process in dollars and cents, a standard upon which the defendant's interests in being fairly tried cannot be sacrificed. *Taylor v. Hayes*, 418 U.S. 488, 500 (1974). Neither can the state's interest in this case be quantified in dollars and cents; for if any cost to the state is to be an element of a balancing test in this case, the cost that is paramount is the harm to society when its criminal trials are unfair. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); Pet. Br. 29-31. *See also Mayberry v.*

Pennsylvania, 400 U.S. 455, 468 (1971) (Burger C. J., concurring) ("A criminal trial is not a private matter; the public interest is so great that the presence and participation of counsel, even when opposed by the accused, is warranted in order to vindicate the process itself.").

IV.

PETITIONER'S EQUAL PROTECTION CLAIM REMAINS UNCONTRADICTED BY RESPONDENT'S ARGUMENTS.

Respondent has not addressed the merits of Petitioner's equal protection claim. (Pet. Br. 47-50). Moreover, none of Respondent's Due Process or Sixth Amendment arguments diminish the force of that claim. Regardless of how the Court balances the interests in determining the requisites of due process and regardless of whether it limits the scope of the Sixth Amendment's application in criminal prosecutions, there can be no doubt that to deny a misdemeanor defendant the right to appointed counsel at trial results in an equal protection violation as, if not more, serious than the equal protection violation found in the denial of the right to appointed counsel on first appeal in *Douglas v. California*, 372 U.S. 353 (1963), and in the denial of a free transcript in the appeal of a fine-only ordinance violation in *Mayer v. City of Chicago*, 404 U.S. 189 (1971). (*See* Pet Br. 48-50).

CONCLUSION

For the foregoing reasons and the reasons stated in Petitioner's initial brief, Petitioner respectfully requests that the judgment of the Supreme Court of Illinois, which affirmed the decision of the Appellate Court of Illinois, First District, which affirmed the conviction of Petitioner by the Circuit Court of Cook County, Illinois be reversed.

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1177

AUBREY SCOTT,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

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INTEREST OF NLADA AS AMICUS CURIAE

(1) The National Legal Aid and Defender Association (NLADA) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to the poor. Its members include the great majority of

defender offices, coordinated assigned counsel systems, and legal aid societies in the United States. The NLADA also includes four thousand individual members, most of whom are private practitioners.

(2) The NLADA joins the petitioner in seeking to extend this Court's decision in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), to require that publicly compensated counsel be provided or properly waived before any person can be convicted of an offense for which incarceration is an available penalty. NLADA believes that the court's decision in *Argersinger* has led to significant problems which must now be considered and which lead to the conclusion that the right to counsel should be extended.

(3) The NLADA further believes that there has been sufficient experience in the area of providing defense services to assert that counsel can be provided in these additional cases without substantial increases in expenditures by local jurisdictions.

(4) The National Legal Aid and Defender Association has received the consent of both parties for the filing of this brief.

ARGUMENT

I. The Right To Counsel Can Be Extended To All Persons Charged With Offenses Punishable By Incarceration Without Undue Financial Hardship To Local Communities.

While NLADA strongly submits that this case should not be decided on the basis of the cost of extending counsel to all persons facing the possibility of incarceration, we are mindful of the concurring opinion of Justices Powell and Rehnquist in *Argersinger v. Hamlin*, 407 U.S. 25, 41-66 (1972), in which the issue of the cost of providing counsel was discussed at some length. NLADA believes that given the present "state of the art" and the knowledge regarding the appointment of counsel in misdemeanor cases, there are a number of vehicles which can be used to very substantially decrease the cost to local units of government of expanding the right to counsel to all persons faced with the possibility of incarceration.

A. Many jurisdictions have already expanded the right to counsel.

While under *Argersinger* counsel is constitutionally required only where the court determines that the defendant will probably be sentenced to jail if convicted, the fact is that many jurisdictions have already expanded the right to counsel beyond that required by *Argersinger*. In the most extensive study of the question undertaken since the Court's decision, NLADA ascertained that in more than half the reporting jurisdictions counsel is provided either all misdemeanor defendants or all those defendants charged with misdemeanors which are punishable by a jail sentence, *The*

Other Face of Justice, National Legal Aid and Defender Association (1973). Considering the fact that this study was undertaken only a year after the *Argersinger* decision, one can assume that many more jurisdictions have expanded the right to counsel beyond that which this Court mandated. Indeed, in states like Wisconsin, both the State Supreme Court /1 and the legislature /2 extended the right to counsel to all persons charged with crimes punishable by incarceration.

NLADA thus respectfully suggests at the outset that the cost question is not as great as it might appear. Indeed, it is respectfully submitted that many jurisdictions in this country have already expanded the right to counsel in misdemeanor cases beyond that which is required by *Argersinger*. It is submitted, therefore, that the fiscal ramifications to the country as a whole will not be nearly as great as would be anticipated if all jurisdictions had not expanded the right to counsel beyond *Argersinger*.

B. *Many offenses can, and should, be decriminalized.*

The most obvious way to avoid the cost of providing counsel to persons charged with crimes punishable by incarceration is to change the applicable statutes so that such acts are not punishable by incarceration. In this way the legislature or the county board of supervisors can determine whether such offenses should remain

/1 *State ex rel. Winnie v. Harris*, 75 Wis. 2d 547, 249 N.W. 2d 791 (1977).

/2 Sec. 977.08(2)(c), Wis. Stats. (1977).

criminal, or should be reduced to some type of civil forfeiture. In Wisconsin, for example, where the right to counsel has been extended to all persons charged with offenses punishable by incarceration, the legislature reclassified all crimes and civil forfeitures, and decriminalized a number of offenses previously classified as misdemeanors. While there has been great public controversy about decriminalizing some offenses, such as possession of marijuana, and those offenses which involve sexual conduct, the Wisconsin experience does not involve these types of offenses at all. The Wisconsin state legislature decriminalized such acts as possession of a fluoroscopic shoe-fitting machine (sec. 941.34, Wis. Stats.), refusal to relinquish a party line (sec. 941.35, Wis. Stats.), posting a trespassing sign on someone else's property (sec. 943.13(3), Wis. Stats.), and throwing debris on a lakeshore (sec. 947.047, Wis. Stats.). Each of these former misdemeanors was made a civil forfeiture in Ch. 173, *Laws of 1977, State of Wisconsin*. It is respectfully submitted that many jurisdictions could go through its statute books, and make enlightened political decisions as to which offenses are sufficiently important as to warrant confinement in jail, and which can be appropriately dealt with by a civil forfeiture.

If the Town of Wood, South Dakota — referred to in the concurring opinion in *Argersinger* — has insufficient resources to provide counsel to criminal defendants, perhaps it would have been more appropriate to require the defendant to pay a modest fine than to place him in a jail where the city would be required to house him, guard him, and feed him. Contrary to the suggestion in the concurring opinion, the Town of Wood does have options beyond simply prosecuting or not prosecuting. The town board, or the appropriate legislative body, could recognize the ramifications of making an offense a

criminal offense, and then decide to what extent the town's interest requires incarceration. If the town's interests are so important as to require such a penalty, then the right to counsel must attach. If the town decides that its interests are served by the imposition of a civil forfeiture, then that appropriate type of penalty can be imposed without counsel.

Adopting the petitioner's position in this case would require the states and local jurisdictions to rethink the propriety of some of the penalties set by statute. In Wisconsin, for example, the legislature determined that there was no particular reason for providing a sixty-day jail sentence for someone who possessed a fluoroscopic shoe-fitting machine. Similarly, the legislature revised a large number of traffic offenses to reduce them from misdemeanors to civil forfeitures. It is submitted that such a review of the criminal statutes would not only be appropriate to determine whether counsel should be provided, but is also generally appropriate simply to remove anarchistic laws from statute books, and to more appropriately set penalties. Reversal in this case might also suggest to the states that review of the enabling statutes giving local communities the power to establish crimes is also appropriate in view of the additional due process requirements in misdemeanor cases.

NLADA thus respectfully submits that the cost of complying with the decision in Scott's favor in this case will be very substantially reduced by the governmental agencies themselves reviewing and revising the statutes to decriminalize a number of petty offenses which need not and should not be considered crimes. If such offenses are important enough to carry a jail term and to be placed on the defendant's record as a crime, they are important enough to require the provision for or waiver

of counsel. If the legislative body feels that the offenses are minor and do not require incarceration, then no counsel will be required.

C. Sufficient experience with public defender systems has been had so as to demonstrate that a significant cost saving can be had through a modification of the system for providing defense services.

1. There are superior and less expensive systems of providing defense services.

There is no question but that if the local units of government respond to a reversal in this case by simply assigning additional private counsel to each case, the cost to some jurisdictions will be rather substantial. NLADA, however, respectfully submits that there are various options available to local communities which significantly mitigate the increase in cost, and may, in many instances, actually reduce the costs from that w! ch is paid for compliance with *Argersinger*. NLADA strongly submits that adoption of public defender systems is a logical and appropriate response to this Court's decision to expand the right to counsel to all persons charged with misdemeanors. The jurisdiction which decides to continue the appointment of private counsel on an *ad hoc* basis would do so through choice, and not through the lack of available alternatives.

The NLADA emphatically rejects the proposition that public defender services are in any way inferior to that of assigned private counsel. Indeed, all evidence points to the contrary. The 1978 proposed draft of the American Bar Association's *Standards Relating to Providing*

Defense Services modifies the previous provisions to urge availability of public defenders in every jurisdiction. Sec. 5.1-2 of the proposed draft advocates the operation of a mixed public defender/assigned counsel system in every jurisdiction. The NLADA strongly supports the recommendation of the ABA *Standards*. The commentary to the proposed *Standards* points out the benefit of a public defender system:

> When adequately funded and staffed, defender organizations employing fulltime personnel are capable of providing excellent defense services. By devoting all of their efforts to legal representation, defender programs ordinarily are able to develop unusual expertise in handling various kinds of criminal cases. Moreover, defender offices frequently are in the best position to supply counsel soon after an accused is arrested. By virtue of their experience, fulltime defenders also are able to work for changes in laws and procedures aimed at benefiting defendants and the criminal justice system.

The ABA *Standards* go on to urge the continuation of the substantial involvement of the private bar. Again, NLADA agrees. It must be noted, however, that the ABA Standing Committee, which was made up primarily of non-public defenders, made this important recommendation. In the NLADA's own study, *The Other Face of Justice*, eighty-five percent of the responding judges indicated that public defenders were equal or superior to *retained* counsel, p. 51, Table 83. The judges indicated that few assigned private counsel were superior to retained counsel, but that approximately one quarter of the public defenders were superior to those attorneys

who had been paid directly by the defendant. If there ever has been a time in this country when public defenders were second-class lawyers providing defense services only because of the inability to find other work, that time is long behind us. Presently the public defender systems available in many parts of this country are at least equal to, if not vastly superior to, representation which is available in criminal cases from the average private attorney.

2. The fiscal implications of this Court's decision can be very substantially mitigated.

The State of Wisconsin is undergoing a substantial change in providing defense services. /3 In 1977 the legislature adopted a unique state-wide public defender system which not only creates a mandatory mixed system of public defenders and private counsel, but also removes from the judiciary the power to appoint counsel, placing that power under the State Public Defender, who is required to follow strict due process guidelines to determine which attorneys are appointed, *see* Ch. 977, Wis. Stats. (1977). In creating the statewide trial public defender system, the State of Wisconsin has analyzed the ramifications of expanding the right to counsel from that mandated by *Argersinger* to that mandated by the Wisconsin Supreme Court in *State ex rel. Winnie v. Harris*, *supra*, and that which would be required by reversal in this case. /4

/3 The writer of this brief served as State Public Defender of the State of Wisconsin from November 1972, until September 1, 1978.

/4 The data in this brief is taken from the budget documents submitted to the Governor of the State of Wisconsin by the Office of the State Public Defender in September, 1978.

The Wisconsin study reveals several things. First, that under any set of circumstances, a large number of persons charged with misdemeanor offenses, even carrying jail sentences, are going to waive counsel. In Wisconsin, for example, there is no county in which more than fifty per cent of the misdemeanants requested that counsel be appointed, notwithstanding the fact that most counties are complying with the Wisconsin Supreme Court's decision mandating counsel in every misdemeanor case. While under *Argersinger* counsel was appointed in between fifteen and twenty-five per cent of the misdemeanor cases, after the *Winnie* decision, counsel has been assigned in between twenty-five and forty per cent of the cases. Even in those counties which experienced a dramatic rise in the appointment of counsel in misdemeanor cases, it occurred not so much from expanding the right beyond *Argersinger*, but in appointing counsel in any misdemeanor cases. A year-long investigation by the State Public Defender revealed that in some counties in Wisconsin counsel had *never* been appointed in misdemeanor cases. After public scrutiny was given to the lack of counsel in misdemeanor cases, the number of attorneys appointed rose dramatically in some counties, not because of the *Winnie* decision, but rather because the local county courts were for the first time following *Argersinger*. Considering the conclusion reached in Krantz, *Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin* (1976), one might assume that if this Court grants the petitioner relief that there will be many false readings on the impact of the decision because of the failure of many jurisdictions to comply with *Argersinger*, even now, five years after it was decided.

The Wisconsin study also revealed some important fiscal data which will be of relevance if the court is

concerned with the cost of implementing the *Scott* decision. The Wisconsin figures reveal that the average public defender cost of handling a misdemeanor case, that is, a criminal case in which the statute provides for jail punishment, is approximately $90. This figure is arrived at by an average of public defender cases in those urban communities in Wisconsin, such as Milwaukee and Madison, which have public defenders, and averaging them with those public defender systems in Wisconsin which are in rural areas, such as Oneida, Forest, and Portage Counties. In the urban counties, the cost-per-case is significantly less, due to the economy of scale, while the number is somewhat greater in the rural counties. The cost for appointing private attorneys who are compensated in Wisconsin at the rate of $30 per hour is between $150 and $200 per case. This rate does not vary significantly from the urban to rural areas, although courts vary in their practices of reducing attorney billings.

Assuming that an affirmative decision in *Scott* will increase the number of attorneys appointed by as much as fifty per cent, the cost in each jurisdiction can be computed out rather accurately. Indeed, should jurisdictions now using assigned counsel systems go to a mixed system of fifty per cent public defender and fifty per cent private bar, the cost of expanding the right to counsel from that recognized in *Argersinger* to that which would be required by this case, would be less than a ten per cent increase. If jurisdictions were to go to a system of twenty-five per cent private bar and seventy-five per cent public defenders, the cost of providing counsel would actually decrease from *Argersinger* to the expanded role. This can be demonstrated in a jurisdiction which has one thousand misdemeanor cases per year. Now approximately two-hundred-fifty persons will receive assigned counsel services at a cost of

approximately $50,000. If the right to counsel is expanded, and if the Wisconsin experience is typical, a system in which two hundred misdemeanants receive assigned counsel, and two hundred misdemeanants receive public defender services, the cost to the jurisdiction will be approximately $58,000. If the mix is twenty-five per cent private bar and seventy-five per cent public defender, the costs will be $47,000, or $3,000 less than present, although one-hundred-fifty people will be receiving counsel who did not receive it under the earlier decision.

The foregoing analysis assumes that there is no partial payment of attorneys' fees by the defendant, and that recoupment is not possible. Obviously, these are possible vehicles for providing counsel, although NLADA does not advocate either.

While the foregoing analysis is based upon one state's experience, albeit a fairly detailed experience with documented evidence, specific numbers will unquestionably vary from jurisdiction to jurisdiction. The primary position advanced by NLADA, however, is that after a careful study of the costs of providing counsel, and examination of the existing caseload and the anticipated caseload, the costs of providing counsel to every person charged with a crime carrying a criminal penalty can be very substantially mitigated, and in some instances the increase can be eliminated altogether. If jurisdictions choose to continue with the *ad hoc* appointment of individual private attorneys at an hourly rate, the cost will be greater, but that is a choice each jurisdiction will have to make for itself. NLADA believes that effective and competent representation can be provided through a mixed system of public defenders and private bar, and can very substantially reduce costs. If

the jurisdictions choose to adopt that type of system, the cost of implementing this decision can be drastically reduced.

II. There Are Substantial Reasons For Reconsidering The Decision In Argersinger.

A. The lack of any standards for determining when counsel is required leads to the arbitrary denial of counsel.

In *Argersinger*, the Court gave little guidance to trial courts to determine when counsel should be assigned, other than requiring that counsel be assigned if the defendant is ultimately sentenced to jail. The problems with this decision are manifest. Primarily among them is the fact that there are no standards or criteria for a court to determine which cases get counsel and which do not. Inasmuch as for each such offense the legislature has already determined that in at least some instances incarceration is appropriate, the court must then decide in which of such cases incarceration will actually be imposed. In some jurisdictions the judge will entirely abdicate his or her responsibility to impose sentence by relying entirely upon the recommendation of the prosecutor, who will inform the court in advance of whether a jail sentence is sought, *see, The Other Face of Justice*, p. 38, Table 53. This shift of the sentencing responsibility from the court to the prosecutor is obviously not advisable.

In many jurisidictions the right to counsel will depend upon the personal philosophy or point of view of the judge in the case. In such typical misdemeanor cases as possession of marijuana; fornication; prostitution; and issuing worthless checks, the sentencing policy may differ dramatically from one judge to another, so that

the right to counsel will not depend so much upon the offense with which a defendant is charged, as upon the judge or county in which the offense took place. In some counties possession of marijuana may be charged as a civil forfeiture under a county ordinance, while in other counties, possession of marijuana will be charged as a misdemeanor and jail routinely imposed. In such circumstances the courts will have basically usurped the prerogatives of the legislature by determining in advance what type of sentence will be imposed in every case, while at the same time basing the defendant's right to counsel on the judge or the jurisdiction, and not on the offense, the possible penalty, or the defendant's background.

In a more typical situation, however, the judge will make some type of pretrial inquiry to determine that if the defendant is convicted, he or she will probably be sent to jail. While such a policy has been questioned by the petitioner, it has also been identified as a problem in the concurring opinions of the Chief Justice and Justice Powell in *Argersinger*. More recently, the Chief Justice, in the Court's opinion in *Holloway v. Arkansas*, ____ U.S. ____, 98 S. Ct. 1173, 1180, fn. 11 (1978), noted that it would be "unfair" to disclose to the trial judge information before trial which may ultimately reflect on the court's actions at trial, or in sentencing. It seems obvious to the NLADA that requiring a court to make a pretrial examination of the defendant's background is inherently prejudicial and contrary to fundamental notions of fairness and due process of law.

The Court has failed to require that the jurisdictions adopt any kind of guidelines, criteria, or standards for determining when jail will be imposed, and thus when counsel will be required. Unlike the Court's decision in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), wherein the Court did lay down standards and criteria for determining

when a probation or parole revokee had the right to counsel, *Argersinger* is silent on that point. It is respectfully submitted that the lack of such standards is a manifest shortcoming of the *Argersinger* decision.

B. Argersinger leaves unanswered many critical problems regarding the provision of counsel in criminal cases.

It is respectfully submitted that the rule of *Argersinger* creates many problems in providing counsel. While the suggestion has been made in the concurring opinions in *Argersinger* that it is possible to grant a mistrial during a case in which counsel has not been appointed for the purpose of assigning counsel, and, thereby exposing the defendant to incarceration, NLADA has grave reservations regarding the constitutionality of such procedure, as is also suggested in the concurring opinions. NLADA does not see that as the most serious problem with the implementation of *Argersinger*. In addition to the lack of any articulated standards, NLADA believes that the Court must address the problem of what procedures follow the imposition of a fine or probation when the defendant faces jail because of probation revocation or the failure to pay a fine.

If the defendant is charged with a crime which carries a penalty of incarceration, but such incarceration is withheld in favor of a fine or probation, the defendant apparently would have no right to counsel under *Argersinger*. Assuming that probation is imposed, or that the defendant is sentenced to a fine, what happens when either probation is revoked, or the fine not paid? Can a defendant be sent to jail for failure to pay a fine when the

original conviction was obtained without counsel? One can readily envision a situation in which counsel would be required in a probation revocation under *Scarpelli* (which apparently applies to both felony and misdemeanor cases), wherein the defendant was not entitled to counsel at the time of the original conviction. This may be the case even though the condition of probation which the defendant is alleged to have violated was a condition imposed by the court at the time of the original sentence, at which time he or she had no right to counsel.

NLADA does not believe that a defendant who has been tried without counsel or without waiving counsel can be sent to jail under any circumstances. Even if counsel is provided at a hearing to determine whether the failure to pay the fine was willful, or to determine whether the defendant violated the conditions of the probation, that still does not reach the issue of whether the defendant was afforded due process of law at the time of the original trial, and whether the conviction was validly entered.

NLADA also submits that it would be a violation of the double jeopardy provisions of the fifth and fourteenth amendments to the United States Constitution to allow a defendant to be re-prosecuted for a crime, with counsel, after his conviction for the same crime without counsel, *see* Krantz, *supra*, p. 77, citing *Downum v. United States*, 372 U.S. 734 (1965).

CONCLUSION

The National Legal Aid and Defender Association respectfully submits that adoption of the position advocated by the petitioner in this case will not unduly burden local jurisdictions which will be faced with some additional expense in providing counsel. It further submits that there is sufficient experience with defender systems in this country to assert that there are a number of methods in which the cost of counsel can be very substantially reduced. NLADA feels there have been substantial problems with the implementation of *Argersinger*, and there remain problems with its meaning and scope. For all of these reasons, as well as for the reasons asserted by the petitioner, which are adopted by amicus, NLADA respectfully submits that the mandate of the Illinois Supreme Court should be reversed and the cause remanded with directions to grant the petitioner a new trial, at which time he is represented by counsel.

Respectfully submitted,

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